UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

- x

In the Matter of:

SEARS HOLDINGS CORPORATION,

Debtor.

- x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

February 7, 2019

9:27 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: NAROTAM RAI

HEARING re Evidentiary Hearing

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P R O C E E D I N G S

THE COURT: Sears Holdings Corporation. Before we begin, I just want to make double sure that Court Call is hooked in, that the people are on there, Court Call operator.

OPERATOR: Yes, Your Honor, we are all set.

THE COURT: All right, because there'd been an earlier email that maybe that wasn't the case. Okay. You can go ahead, Mr. Schrock.

MR. SCHROCK: Okay. All right, good morning, Your Honor. For the record, Ray Schrock, Weil, Gotshal, and Manges on behalf of the Debtors.

THE COURT: Morning.

MR. SCHROCK: Your Honor, we are here on closing arguments to finish up the summary preceding for approval of substantially all of the Debtors -- sale of substantially all of the Debtors' assets to an ESL owned entity, Transform Co. Your Honor, I do have a few slides that I'd like to walk through to organize my points and my thoughts. May I approach?

THE COURT: Sure. Thanks.

MR. SCHROCK: Your Honor, today is obviously a very important day for Sears and there have been many of those in the short course of this case, but this, in fact, may be the most important day. Everything depends on it.

The fate of Sears is going to be in the Court's hands. We have done everything that we can to save this company over the last several months and as Your Honor may remember, when we first started this case, we put it on a very fast timeline and we knew that it was going to be a tremendous amount of work to even get to this position, but I think even by -- and I think I speak on behalf of all the professionals, the stakeholders involved -- I think everybody would acknowledge it's frankly been even more than that. It's been extraordinary.

We very much are in support of approving the sale to ESL and the primary objections that have been lodged against the sale revolve around whether the sale transaction has been the product of an adequate sale process, the high -- you know, whether it's the highest or best alternative. And we believe that the evidence submitted during the summary proceeding overwhelmingly demonstrates that the Debtors have carried their burden.

Now, Your Honor, on Slide 2, we also note that we have addressed a few other key issues at the request of the Court that I'll be covering this morning: ESL's assumption of $166 million of accounts payable, the potential overhang of warranty liabilities, the Transition Service Agreement, Cyrus' allowance of claims, the "non-credit" bid value for unencumbered assets, clarifying the scope of release for

ESL, and the KCD administrative claim. I'll be turning the podium over to Mr. Basta following my comments to cover issues related to the subcommittee and the credit bid and release issues.

Last night and this morning, we filed a few documents with the Court. We did file a form of Transition Services Agreement. It's in substantially final form. Parties are still working out a few issues, but we believe that it's very close. We filed the schedules to the asset purchase agreement. Importantly, these schedules were done at the time of signing the asset purchase agreement and that schedule contains, among other things, a Schedule 1G that demonstrates that the $166 million of accounts payable was, in fact, agreed to be assumed by ESL.

And just to put it out there, Judge, this is an important issue. We have not come to terms with ESL on that particular point. The Debtors are prepared to close on the contract as written, but we will be asking the Court for Court's guidance on -- we're not going to engage in litigation post-closing. If ESL's prepared to close on the agreement as written, take the 166, we have a deal. If they're not, then we don't have a deal, and I think that's where the parties are at the moment but I do have copies of the schedules.

THE COURT: I was going to ask you for that

schedule in particular because I think it's 1.1G or 1G.

MR. SCHROCK: Yes, Your Honor.

THE COURT: For other payables.

MR. SCHROCK: So, Your Honor, as it does demonstrate on Schedule 1G -- 1.1G which is defined as other payables --

THE COURT: It just says $166 million. I assumed accounts payable.

MR. SCHROCK: Yes.

THE COURT: Okay.

MR. SCHROCK: Yes.

THE COURT: It's about a broad as you can get.

MR. SCHROCK: That's about as far as we could get, Your Honor.

THE COURT: Okay.

MR. SCHROCK: I'm taking these a little bit out of order, but on the KCD administrative claim, I do have an important announcement for the Court and parties in interest. I'm very pleased to report that last evening the Debtors' Restructuring Committee agreed to a settlement terms sheet with the PBGC. That settlement results in a number of things and a number of benefits for these estates, but it doesn't just resolve their objection to the sale. It also resolves their claims in these cases.

Your Honor, I do have a copy of the settlement

terms sheet that I'll be prepared to walk through. I'm going to hand it up to you and we have copies available for parties in interest.

THE COURT: Okay. Thanks.

MR. SCHROCK: So, Your Honor, this settlement proposal which really is phenomenal, we have come to an arrangement where the PBGC will withdraw their objection to the ESL sale. This agreement is not contingent upon closing of ESL transaction, but we have agreed and the Debtors have agreed, importantly, that to the consensual termination of the Sears pension plan and the Kmart pension plan effective as of January 31, 2019. And importantly, this is just an agreement to the Debtors. This does not affect the obligations or the rights and cannot be used as a sword against non-debtors.

There's going to be an agreement on a claim that -- a general unsecured claim that would be held against all Debtors because there is a joint and several claim. It's been lowered from the asserted amount of roughly $1.7 billion to $800 million. The termination premium is not going to -- the Debtor is not going to be liable for that. And importantly, the PBGC would be willing to support a chapter -- and will support a Chapter 11 plan, subject to approval of a disclosure statement in both their claims in favor of a plan.

The PBGC, which holds -- which has a director at KCD will also take steps with the Debtors to ensure that any claims of KCD against the Debtors are waived in total. So importantly, the $111 million claim that's been talked about and then I think the Committee's witnesses, the Debtor, and myself have said, listen, this is an administrative claim. That claim --

THE COURT: Well, potentially want.

MR. SCHROCK: Potentially want, is in fact resolved. Because of the steps that the PBGC has taken in conjunction with the sale because of the steps they're taking to assist with all of the issues with the administrative -- purported administrative claim, the substantial reduction and their allowed claim as a general unsecured claim for 1.6 down to roughly $800 million, we are agreeing that under the terms of a plan, that they would have a priority right to $80 million of net proceeds and litigation actions.

There's also a release, and this is subject to documenting this and moving forward for approval on settlement. Now importantly, that settlement is not up for approval today, but I think for purposes of this hearing, Your Honor, what matters is the PBGC withdrawing its objection and the Debtors, we believe we have a path forward to resolve the KCD administrative claim. Nothing's

guaranteed and nothing's guaranteed in this case on administrative solvency and on any ESL nor is it guaranteed, certainly, in a winddown. There's heavy risk, in our view, around the winddown and we'll talk more about that.

THE COURT: So you'll be seeking approval of this settlement.

MR. SCHROCK: Mm hmm.

THE COURT: The aspects that are in effect immediately.

MR. SCHROCK: That's correct.

THE COURT: I'm assuming reasonably promptly; although, maybe it'll be in the context of seeking approval of a plan, maybe it'll be separate.

MR. SCHROCK: Yeah, I would expect, Your Honor, we're going to document a plan and likely a restructuring support agreement promptly and be moving forward with approval. We're also going to sit down with the Committee on the terms of a plan. So we haven't worked out precisely if it's going to be in the context of the plan or separate, but we'll be moving forward promptly.

THE COURT: Okay. Now, I know counsel for the PBGC has participated. Is that a fair summary of the settlement? I mean, I have the signed terms sheet, but...

MR. RAYNOR: Good afternoon, Your Honor. For the record, Brian Raynor on behalf of the PBGC. Everything that

Mr. Schrock said is consistent with the terms sheet and one obligation under the terms sheet is to formally withdraw our objection to the sale and I'd like to do that on the record right now.

THE COURT: Okay. Very well. Thank you.

MR. RAYNOR: Thank you, Your Honor.

THE COURT: Okay.

MR. SCHROCK: So, Your Honor, moving on from the PBGC settlement, that -- you know, we think the evidence in this matter is very much largely uncontroverted.

THE COURT: I'm sorry, can I --

MR. SCHROCK: Yes.

THE COURT: Can I go back to your Slide --

MR. SCHROCK: Which one?

THE COURT: -- Number 1. You mentioned a Transition Services Agreement and I haven't had a chance to review that yet. Is it essentially neutral to the Debtors? Are the Debtors performing obligations under it that they can't perform because they don't have the money to do so or, alternatively, are they relying on ESL to perform obligations that they don't have the money to do so?

MR. SCHROCK: Your Honor, I think it's fair to say, like most Transition Services Agreement, it's a framework for the parties to work together over the near term. And given the pace at which this is closing, there

are some things that ESL needs from the Debtor such as Transform Co. is not licensed to conduct business and they're going to need to use the Debtors' licenses. They're agreeing they're leasing the Debtors' employees. We're getting access to books and records to finish the conduct of the case. There is agreement from the Debtors for some cash payments over the next 60 days for the use of, basically, facilities, conducting GOBs, liquidating inventory.

THE COURT: Cash payment by the Debtors.

MR. SCHROCK: By the Debtors.

THE COURT: In respect to the sold assets.

MR. SCHROCK: Yes, over the next 60 days. Now, we can agree to extend that 60-day timeframe. We can come to an agreement as is common. I don't -- one thing is for certain, Your Honor, and like every other Transition Services Agreement I'm very confident that the parties are going to have to supplement it because as -- if we are fortunate enough to close the transaction tomorrow, parties are going to need to be able to work together.

THE COURT: No, I understand that. I just want to make sure that it's essentially neutral, that the benefits the Debtors are getting out of it are no less than what they're paying for and vice versa.

MR. SCHROCK: That is very much the --

THE COURT: That the benefits ESL's getting out of

it are going to be paid for by ESL.

MR. SCHROCK: That is very much the intent, Your Honor.

THE COURT: Okay.

MR. SCHROCK: So there is -- there are modest cash payments from the company coming out of that, but, you know, when you go through all of the back and forth --

THE COURT: But is the company providing services to ESL that it isn't being compensated for that?

MR. SCHROCK: It's all being taken into account in terms of the back and forth, in terms of who's providing what services. At the end of the day, there's a net payment coming from the Debtors.

THE COURT: Right.

MR. SCHROCK: But we believe that it's a fair compromise in light of what's being required from all the parties on each side. But primarily, we're going to need access to somewhat transform those transform those assets to liquidate them.

THE COURT: Well, as far as the services that the Debtors are providing, will they have the resources to provide those services?

MR. SCHROCK: Yes, Your Honor.

THE COURT: And/or be paid for it if they don't?

MR. SCHROCK: Yes, Your Honor.

THE COURT: Okay. Is that ESL's understanding, too?

MR. BROMLEY: Your Honor, James Bromley from Cleary Gottlieb on behalf of ESL. So, the answer is yes, the TSA is structured in a way that the Debtors will be paying $1.25 million a month during this period of time, subject to extension, to ESL for a vast host of services, the cost of which is much in excess of the 1.25. For the services that the Debtors are providing back to ESL, there'll be a payment from ESL of $250,000 a month. So the net is a million dollars a month during that period of time, the 60 days subject --

THE COURT: Okay.

MR. BROMLEY: -- to extension.

THE COURT: And the primary services are, in essence, being able to do GOB sales? I mean, is that keeping the -- access to the properties?

MR. BROMLEY: There's a variety of things. That's one of them, Your Honor. But upon closing, assuming that the sale closes, nearly all of the Debtors' operations will be transferring to the buyer and the Debtor needs some of the services back in order to continue its operations in winddown.

THE COURT: Okay.

MR. BROMLEY: So in that sense, ESL or the NewCo

will be providing those services back to the estate.

THE COURT: All right.

MR. BROMLEY: And in terms of the cost neutral element of it, the cost of providing the services by NewCo is far in excess of the net million dollars that's going to be paid by the Debtor.

THE COURT: Okay.

MR. SCHROCK: And from the estate's perspective, Judge, the primary thing that we believe we're getting, I mean access to books and records, we don't think that's something --

THE COURT: No, that's not a big -- I mean, that's in the contract.

MR. SCHROCK: That's in the contract. It's not really a big deal.

THE COURT: Right.

MR. SCHROCK: But we need access to finish GOBs, to bring those assets into the estate --

THE COURT: Right.

MR. SCHROCK: -- they need from us licensing. That's the real trade here over the next 60 days, but when we did the math --

THE COURT: And they're taking some of your -- or all of your people, primarily, or almost all of them, so --

MR. SCHROCK: Almost all the people. Yes.

THE COURT: So some of them will continue to provide the services you need related to the winddown of the --

MR. SCHROCK: Well --

THE COURT: -- rest of the case.

MR. SCHROCK: Yes, Your Honor. Well, importantly, we are agreeing to -- we leasing employees, in fact, to -- under the Transition Services Agreement, to Transform Co. over the near term. So those employees are still going to be technically the Debtors' employees for a period of time until they get their systems up and running.

THE COURT: Okay. And the -- you have some other things on here. Are you going to get to those later or do you want to cover them now? The overhang on warranties, the Cyrus --

MR. SCHROCK: Yeah --

THE COURT: -- release.

MR. SCHROCK: So, Your Honor, we can take those out of order. So on the potential overhang on warranties, if Your Honor were to turn to Slide 27, there's a provision in the agreement that pending the transfer of the KCD notes --

THE COURT: I'm sorry, so this isn't anything new?

MR. SCHROCK: No --

THE COURT: I just want you to summarize anything

new. I'm not --

MR. SCHROCK: Okay, okay, yeah --

THE COURT: I'm sorry, I didn't want to have you get out of the order.

MR. SCHROCK: That's just a clarification under the agreement. That's already handled.

THE COURT: All right.

MR. SCHROCK: Yeah, so --

THE COURT: Okay.

MR. SCHROCK: Going through this list --

THE COURT: Yes. If there's anything new on here as opposed to just explaining each part of the oral argument, you should let me know.

MR. SCHROCK: The scope of the release is the only other thing that I think Mr. Basta will address that after --

THE COURT: Okay. And related to that is Cyrus, I guess, clarifying that.

MR. SCHROCK: That's right. But Cyrus, again, is just -- I'll handle it in argument --

THE COURT: Okay.

MR. SCHROCK: -- Mr. Basta, but it's --

THE COURT: All right.

MR. SCHROCK: It's, literally, nothing changed.

THE COURT: Okay.

MR. SCHROCK: Your Honor, moving forward on Slide 3, the evidence in this matter is largely uncontroverted in favor of a number of conclusions, including that the sale transaction is subject to the business judgment standard and that we meet the standard of a valid exercise of the Debtors' business judgment. The sale process was thorough, competitive, and a highly public process carried out in compliance with Court's approved global bidding procedures.

The sale transactions' superior to the winddown alternative and Transform Co. has provided adequate assurance of future performance. Your Honor, the legal standard is set out in 363(b)(1), that the Trustee after notice and hearing may use, sell, or lease other than in the ordinary course, the property of the estate.

Courts in this circuit and others in applying this section have required that the sale of the Debtors' assets must be based on the sound business judgment of the Debtor. Now, where the transaction is negotiated or supervised by an independent fiduciary such as the Restructuring Committee, the business judgment standard, we believe, undoubtedly continues to apply.

This is an unusual auction, Judge, in that in every other auction, I think certainly that I've been involved in, you are comparing two live bidders, one bid being -- you know, could be a going concern bid and another

bid, at least if there's a liquidation alternative, there's at least a liquidator that's really putting up cash, that's providing real value. Here, the company only had one qualified bid, okay, for the auction, for a going concern sale. We were comparing it to a winddown alternative run by the Debtors, okay, and we took that obligation very seriously nevertheless, but I do think it's worth noting that the only qualified bid was for -- was from ESL and Transform Co.

THE COURT: Can I explore that a little bit?

MR. SCHROCK: Sure.

THE COURT: There really was not a whole lot in the record on this, but the prior hearings leading up to the auction referenced the Debtors' soliciting, in essence, bulk bids from liquidators.

MR. SCHROCK: Yes.

THE COURT: And the Debtors announced their conclusion that their retained liquidator, Abacus, actually had the best of that lot, of that group. Abacus -- when you refer to Abacus being the best of that group, is that just based on the terms of Abacus' retention?

MR. SCHROCK: It is, Your Honor. Based on the terms of Abacus' retention and when we were looking at so-called equity bids from liquidators where they were actually going to be purchasing the assets, the recoveries that could

be had on the company's assets was simply superior under a company-run GOB, and I don't really think that issue is in controversy by any of the stakeholders.

THE COURT: Well, certainly no one has raised the argument that any of the liquidators made a higher or better bid.

MR. SCHROCK: Yeah.

THE COURT: But I -- those proposals including the Abacus one, did they include Abacus running anything more than GOB sales; i.e., did they assume that the company would be -- that the Debtors would be marketing the real estate assets separately from the liquidators?

MR. SCHROCK: Your Honor, there were various permutations of those bids and the Debtors actually ran an informal auction during the first week of January among the liquidators in the event that we were going to go the GOB route. The result of that auction --

THE COURT: Right, and you announced that.

MR. SCHROCK: Yeah. And the result of that was that Abacus was a higher or better bid, but we don't have deposits, qualified bids from liquidators and I think that all the parties and the Committee and the Debtors certainly agreed that the recovery under -- it was in Abacus and we also supplemented with SB360 -- Schottenstein, the Schottenstein-run venture to provide additional capacity

that those two parties running the GOBs with the Debtors would provide the highest recoveries and that's what we were comparing in the context of the auction in the winddown alternative.

THE COURT: But I guess my question is, the Abacus terms, were those set forth in their retention, right, they didn't change those?

MR. SCHROCK: Yes, Your Honor.

THE COURT: Except maybe they added SB360, which sounds like a product that Sears would be selling as opposed to a firm, but --

MR. SCHROCK: Yes, Your Honor. So that -- the answer is yes.

THE COURT: Okay.

MR. SCHROCK: It was very modest --

THE COURT: So --

MR. SCHROCK: -- and --

THE COURT: So can I interrupt you? As I remember that retention, they didn't take on the responsibility to market real estate. It was really straight GOB.

MR. SCHROCK: That's correct.

THE COURT: Okay, so --

MR. SCHROCK: That's right.

THE COURT: So when you compared the various ESL proposals including the one that was ultimately accepted, to

a liquidation alternative, it was a combination of Abacus, GOB sales, and the Debtors' marketing of real estate?

MR. SCHROCK: That's correct, Your Honor. So we used a combination of -- as provided in the testimony from Mr. Meghji as well as Mr. Welch -- the combination of appraisals that we had conducted for assets as well as indications of interest received and comparing how we would receive --

THE COURT: I guess there're some miscellaneous assets like potential litigation claims, credit card antitrust issue that -- litigation, that sort of thing but it was primarily GOB and real estate. And you're still doing the GOB.

MR. SCHROCK: We are still doing the GOBs, Your Honor.

THE COURT: All right, so it largely comes down to the real estate.

MR. SCHROCK: That is it. I think that when you really looked at the differences between the Committee's assumptions and the Debtors' assumptions around the winddown, it really did, in our view, come down to the real estate.

THE COURT: Okay.

MR. SCHROCK: You had from the one perspective, the Debtors' valuations that are in the record. They are

uncontested. And during Mr. Greenspan's live testimony, he retracted his two important criticisms of the Welch declaration and lessened his valuation by $50 to $90 million.

I note that Mr. Greenspan also was assuming what I can only say is just a process that's not bound in reality or 365(d)(4) of the Bankruptcy Code that you can liquidate leases over the course of 20 to 24 months and saying you're going to assume those leases and put them in a trust, I think, just does not recognize what the legal restrictions are and the assumption and assignment under the Bankruptcy Code.

And as Mr. Welch further explained, the discounts applied by M3 related to the real estate were reasonable because they accounted for an unprecedented expedited bulk sale of big box properties from a distressed seller. In fact, Mr. Greenspan himself testified that a sale of the properties of the magnitude contemplated by the Debtors was unprecedented. The liquidation winddown analysis reasonably values the real estate.

We think the Toys experience does support our valuation, but I do believe that overall when you look at the appraisals and the rigor through which the Debtors put all of these properties through that test demonstrates that the ESL -- and we'll talk more about it -- was, in fact,

much greater for all of the creditors, writ large.

Your Honor, in Slide 5, we talk a little bit about the marketing process, and I think it's really worth noting that Mr. Aebersold's testimony in this matter is largely uncontroverted. Their initial phase was designed to provide a large number of potential purchasers with information. We engaged with over 250 potential investors, 128 under NDA. It was extraordinary.

The Debtors' and their buyers responded to several hundred diligence questions, held over 40 formal diligence calls and in-person meetings. In multiple formal meetings and numerous other informal discussions with the UCC, the Debtors outlined their marketing strategy, shared the identify of prospective bidders, facilitated in-person meetings with management, and gave the opportunity to review and comment on proposed purchase agreements for prospective bidders.

Now, the UCC had the opportunity to ask Mr. Aebersold about the sales process but they really didn't ask a single question, I believe, about that process and they cannot now challenge that process with the evidence closed.

THE COURT: Well, can I interrupt you on that?

MR. SCHROCK: Sure.

THE COURT: You're about to go to a different point. Turning back the real estate, the Creditors'

Committee asserts that the Debtors did not run a real estate auction, per se. They instead ran an auction where they posited their assumed values for the real estate as a counter to the one going concern proposal that was qualified, which was the ESL proposal.

And they suggest that if you had run a parallel real estate auction, that instead of the relatively modest number of expressions of interest and/or -- well, indications of interest, you would've gotten a much bigger number. And I guess my question is, why wasn't that done and could it have been done?

MR. SCHROCK: Yes, Your Honor. I think, with due respect to my friends on the Committee, I think that they have a selective memory on this issue because when we first undertook the global sale process and had it approved, we were very open with the Committee, we were very open with all parties that we have to do what's within the realm of the possible. So we'd set up the case so we had a chance to run a process, an expedited process on a going concern sale.

We told parties in -- during December that if they wanted to put in indications of interest for the Debtors to consider, that we would certainly -- that we would consider them, but as we told the Committee, we were going to be relying also on nonbinding indications of interest which were due by the 28th and the Debtors' appraisals in

comparing the market value. We have plan exclusivity.

We think that the record -- that you don't have to run a full real estate process and I think, frankly, marketing 500 properties in this amount of time, when you talk about what's within the realm of the possible, Your Honor, in our judgment -- and we have a lot of people working on this matter -- that was not possible to run a full real estate process simultaneously with running the going concern process. But we did test the market. The evidence is uncontroverted on exactly what the Debtors did do.

I think that if -- you know, we were in contact with the Committee during this time, we had a global asset sale procedure process that we followed to the letter with the Court and, Your Honor, during that process we found that there was one -- effectively one qualified bid. But those nonbinding indications of interest, you know, we didn't have a lot of deposits. We didn't have a lot of serious offers.

It was our contemplation that if we weren't able to have a going concern sale, because we looked at the values and we made, we though, generous assumptions around the real estate, that if we couldn't really substantially reduce claims, have a going concern opportunity, either in whole or part by selling divisions or selling the whole business, that then in fact we would have to pivot during

the winddown process to a full real estate liquidation process.

THE COURT: Okay. So, I mean, let me make sure I understand this. To summarize, I guess this is consistent with both Mr. Welch and Mr. Greenspan's testimony, you're saying you could not run an actual real estate sale process in the roughly month-and-a-half, two months that you had. In fact, the minimum time for such a process would be four months and according to Mr. Greenspan it would have to be over a year.

MR. SCHROCK: That's right, Your Honor.

THE COURT: So you did, instead, recognizing that time was valuable here and recognizing the risks of going with just a going concern process without some reality check beyond appraisals which is -- real estate is not like valuing tech assets or -- real estate's real estate. You can do a pretty good valuation of real estate.

You did indicate strongly to those who might believe that a liquidation process with the sale of the real estate would be better to actually put their best foot forward and make at least indications of interest, which is frankly what I said, too, during the hearing on the approval of the sale procedures, looking right at counsel for various potential buyers of real estate and the Creditors' Committee; i.e., if you really believe this, put your best

foot forward and make a proposal. Okay.

MR. SCHROCK: And, Your Honor, building on that, on Slide 6, we do note that -- and it's really worth emphasizing -- this is a process that was conducted pursuant to the Court-approved global bidding procedures. We have followed those procedures throughout the case. The record is uncontroverted on that piece. We had -- we determined what is a successful bid consistent with the global bidding procedures, which qualified bids constitute the highest or best qualified bids. And pursuant to the auction rules, that was determined in the business judgment of the Debtors.

We also had an independent Chief Restructuring Officer that the Court heard from, Mr. Meghji, an independent Restructuring Committee. You've heard from both of the subcommittee members. They were all very active during this process. And, Your Honor, on Slide 7 we do note that there -- I think the record is wholly uncontroverted that the Restructuring Committee here is independent and having certainly live through this, Your Honor, I can vouch that it very much is.

There's a couple of anecdotes here just in regard to that, that the testimony of Mr. Carr as well as Mr. Transier is that they did not have any association or interactions with Mr. Lampert prior to joining the board. We put together an independent Restructuring Committee. I

think ESL knew that if they, given their position within the capital structure that this is going to be necessary, but there's no personal or business relationship either prior to or since that time with either of the Subcommittee members.

This independent Restructuring Committee negotiated with the authority to negotiate and approve the ESL transaction, and the record in these proceedings is that the Restructuring Committee was actively involved. No less than 58 times prior to the proposed ESL transaction being approved did the Restructuring Committee meet since being formed in October 2018, and these were not short meetings. These were lengthy, involved meetings, numerous in-person meetings. The directors, the professionals, everyone took their job extremely seriously and their responsibilities to these estates.

Mr. Aebersold further testified that consistent with his experience, that the sale process was extensive. We have you some anecdotes to that earlier and that to his knowledge and based upon his observations and experience, the auction was conducted in good faith and the sale process provided a fair and reasonable opportunity to purchase components of substantially all the Debtors' assets and operations. That evidence is uncontroverted.

And further, Your Honor, in talking about how independent this Committee was, Committee formally voted to

reject separate bids by ESL on at least two occasions. This was, in my experience, very unusual. I mean, it's a very tight transaction, I think, for ESL as well as the estate, but this is not something where anyone was pandering to anyone at ESL and there's certainly no record to support that. We think the sound business justifications here are consistent with the caselaw in the Second Circuit.

We'd point to Chrysler among others, but there's -- in announcing and looking at what types of consideration that the Court would consider, I think it's worth reiterating just looking at what ESL and Transform Co. are providing. They're committing approximately $5.2 billion in the form of cash and noncash consideration including a cash payment of approximately $885 million. There's a credit bid pursuant to 363(k) of the Bankruptcy Code of secured debt facilities totally approximately $1.3 billion. There's the assumption of $621 million of senior debt including $350 million of the amounts owed under the Junior DIP facility and $271 million of the stand-along LC facility.

Those are all senior claims to general unsecured creditors. There's further, the assumption of certain other of the Debtors' liabilities in the total amount of approximately $1.3 billion including liabilities for warranties and protection agreements or other service contracts, certain customer credits to existing customer

loyalty programs, the Shop Your Way program. All cure costs are being assumed by ESL. There's up to $43 million of certain severance reimbursement obligations. There's up to $139 million of 503(b)(9) claims, and just to hit that for Your Honor, you'd asked what's the mechanism to do that.

The Debtors are obligated to reconcile those claims and there's not an independent right of claimants to go after ESL, but ESL is obligated to the estate to pay those 503(b)(9) claims upon the earlier of 120 days and confirmation of a plan. Our experience -- and we do have an $80 million winddown budget that's built into how we intend to finish these cases -- it's our expectation that we'll do the reconciliation, finish the reconciliation around the 503(b)(9) claims.

We don't expect a lot of costly litigation, certainly, around the 503(b)(9) claims, but those claims are going to be paid by ESL at confirmation of the plan.

THE COURT: The $89 million winddown budget, is that included in the projections that Mr. Meghji went through on the --

MR. SCHROCK: Yes.

THE COURT: -- solvency analysis?

MR. SCHROCK: It is, Your Honor.

THE COURT: Okay. So the Debtors will be reconciling those claims, potentially objecting to them.

Many of those claimants, I would assume, would have an ongoing relationship with -- if I approve the sale -- the buyer.

MR. SCHROCK: That's right.

THE COURT: Is it contemplated that there are going to be some interactions since the buyer's liable for them, in how to resolve those claims?

MR. SCHROCK: There's going to be a lot of interaction, Your Honor, and I think one thing that ESL and the Debtors do recognize, if the sale's approved and we close tomorrow, it's still all the same people that are really doing this work at the company and we're going to be working together and the TSA, the Transition Services Agreement, certainly contemplates that we're going to cooperate, work in good faith to finish the administration of the cases. ESL is heavily incentivized.

They're still a very large claimant as is Cyrus in these estates to have these cases administered efficiently and I don't want that to be lost on the Court. They still have claims in these cases. They still have every incentive to cooperate. They still have every incentive to work with the company to minimize the costs associated with the administration of the estate.

But when I look at what are the noncredit bid items that are really being provided for unencumbered assets

-- and I'm looking at Slide 13 and 14 -- all of these liabilities -- okay, it's just the one -- you just have the one credit bid item, but paying off senior debt, okay, before unsecureds are going to be paid, the assumption of all of these liabilities, the cure costs, these are all things that we negotiated for in order to ensure that these are unsecured claims that are getting paid: property taxes, environmental liabilities. The mechanics' liens are senior secured claims.

So they're all either senior or parry with general unsecured creditors, but there's a lot of -- we focused on the exit facility, but there's cash being paid for these senior claims. And when we look at Cyrus, Your Honor, Cyrus is rolling the entire Junior DIP facility. They went out and purchased the rest of it, repurchased the claim. They put it -- and it's part of the exit financing for this company upon emergence.

And I think that if you didn't give them something in terms of an allowance of claim we would be defeating the very purpose of doing this transaction because the Committee could simply -- or any party could, frankly, just go challenge Cyrus' claims for recharacterization.

So although ESL can technically drag other parties within their facility along for a credit bid, if you think about it, if they didn't have the ability to credit bid, if

that wasn't part of the release for Cyrus, you could move to recharacterize, go after those Cyrus claims and undo the very transaction that we're trying to accomplish here.

So we have to have certainty of closing and we thought that -- Your Honor, they're still liable. The scope of the release is just related to the credit bid, okay? It's not -- and the allowance of their claims. It's not any broader than that and for the transaction even to work, for the transaction to close, we had to provide that.

But we did take that into account in looking at, you know, Cyrus is a very substantial claimholder. They've come into this process. Nothing's going to affect the investigation and the ongoing claims that the estate has other than just related to that credit bid and we think at the end of the day that was a very fair compromise as part of this transaction.

THE COURT: So it wouldn't pertain, for example, if it turned out -- I have no view on whether it will turn out this way, but if it turned out that the sale of the MTN notes --

MR. SCHROCK: Right. Nothing --

THE COURT: -- was somehow collusive, then that's not being released.

MR. SCHROCK: That is not being released. Avoidance actions, not being released. The only thing is

just, again, it's consistent with the scope of the ESL release and I think Mr. Basta will be hitting some of those points. Your Honor, on Slide 15 just to point it out, when you look at the benefits of the wind -- the risks of the winddown --

THE COURT: I'm sorry, can -- before you get to that slide --

MR. SCHROCK: Yeah.

THE COURT: So you were talking about the amount of consideration in addition to the credit bid.

MR. SCHROCK: Yes.

THE COURT: When you look at a -- this is a question for both sides. When you look at the presumed value or assumed value of the unencumbered assets, the assets that, in other words, that ESL/Cyrus don't have a lien on, how do they match up? Because you can't credit bid on something you don't have a lien on, so that means you have to pay something else for it.

MR. SCHROCK: Yes. Of course, Your Honor. So a couple of things here. I mean, of course when we're comparing it to the alternative in the winddown, we don't have the luxury of just assuming you just get all of those amounts, of course. We have to look at them in the context of the winddown analysis and the continued burn that would occur and costs that would be incurred that are senior to

those unsecured claims.

But to answer your question directly, I think it's fair, Your Honor. The credit bid is $1.3 billion. Everything else here, Your Honor, payment of claims that are senior to unsecured creditors. Okay, those all have to be paid regardless of whether or not we're here, we're in winddown --

THE COURT: So just to cut through it, just to do the math, you're saying that basically it's the total value of the ESL deal is $5.2 billion if you subtract a billion three from that --

MR. SCHROCK: That's right.

THE COURT: -- there's $3.9 billion of value provided for the unencumbered assets.

MR. SCHROCK: That's right.

THE COURT: Has anyone placed a value on the unencumbered assets anywhere close to $3.9 billion?

MR. SCHROCK: No, Your Honor.

THE COURT: Okay.

MR. SCHROCK: Your Honor, we think it's unquestionable that the benefits of a sale transaction outweigh --

THE COURT: I'm sorry, can I interrupt you again?

MR. SCHROCK: No, please.

THE COURT: We went --

MR. SCHROCK: That's why I'm here.

THE COURT: You were going through the sale process and the conduct of what people have referred to as the auction here. One of the provisions of the sale procedures order, all of which are waivable in the exercise of fiduciary duties, is to require qualified bidders to provide an allocation of what they're -- what assets they're paying what for. It's uncontroverted that ESL did not do that. I have traditionally viewed --

MR. SCHROCK: We waived it, Your Honor.

THE COURT: You waived that condition?

MR. SCHROCK: We did.

THE COURT: I have viewed that condition which appears in sale orders generally as serving the purpose of letting a seller, the Debtor, and its constituents value a global proposal as against piecemeal proposals so that you can slice and dice the auction to see whether some combination of bids will equal a global bid or a reduced global bid.

It also, though, does have the benefit of giving you the Debtors' -- giving you the buyer's viewpoint of what the -- when the buyer's a credit bidder -- of what the unencumbered assets are. But maybe you can just tell me, why did you waive it here?

MR. SCHROCK: Your Honor, at the end of the day,

we didn't have qualified bids for even sections of the business and when we looked at this in total, and given that the structure of the auction was going to be comparison of the Debtors looking at a going concern versus a winddown, while we did have some indications from ESL around allocations and a view, we had to take -- and I think it's fair to take -- we took a global view as to what consideration was being provided to the company and we understood that the entire business would have to be valued as a whole.

But given that we didn't have any particular bids or qualified bids for particular divisions, that wasn't as much of a concern for the company.

THE COURT: Okay.

MR. SCHROCK: So the benefits of the sale transaction really do significantly outweigh an orderly winddown. And, Your Honor, I know there's been press around the Debtors' severance obligations and what we were doing. I do want to make clear for the record that under either scenario, the Debtors were honoring severance obligations. Those claims are administrative claims in these cases under governing Second Circuit -- Second Circuit precedent.

We deliberately made sure that -- and it was one of the primary purposes around having the winddown, to make sure we could pay severance claims. But we are entitled to

take into account in turning a highest or best offer, not just the economic points. And people make light of it, but there's 45,000 people out there that are working for this company, and it matters. These people will have jobs. As a going concern, we've got uncontroverted testimony from Mr. Kamlani about the steps that they're taking with this business plan.

This business plan is being financed by major commercial banks. They and we are true believers in a going concern for sales -- for Sears, rather. In a winddown, we're going to lose all those jobs. With the exception of probably a few stores and perhaps in Guam, Puerto Rico where there, you know, have some highly profitable operations, we would have to GOB them and we'd see that certain businesses could be possibly be sold in divisions, in parts.

But, Your Honor, this truly is -- like many retailers, it's a melting ice cube and the timing is so urgent, and we saw that even with the Services.com purchase of Parts Direct, which ended up with them not closing. We're now going to end up having to argue with them around the return of the deposit. But we saw, and we believe the evidence is uncontroverted, that there were significant risks around the winddown.

The protection agreement liabilities are going to be honored in a sale transaction. In a winddown, they would

very likely be rejected unless we could find somebody to take those liabilities and basically sell that part of the business for zero or negative value.

THE COURT: Well, while we're on this subject of the protection of the warranty, the protection agreements, there was some discussion yesterday about the risk that there would be a delay in the approval of the KCD --

MR. SCHROCK: Yes.

THE COURT: -- transfer. I thing your announcement of the PBGC resolution somewhat ameliorates that or more than somewhat, but you still have to go to a third party to get approval. How is the risk allocated pending that approval?

MR. SCHROCK: So, Your Honor, we've handled that. If you take a look at Slide 27, section -- this is handled in Section 2.8B of the Asset Purchase Agreement which states that from the closing date until such time as the transfer of the KCD notes and the assumption of purchase agreement liability occurs, the buyer provides services to the applicable sellers sufficient to enable the sellers to perform the purchase agreement liabilities and in consideration for such services, the sellers are paying to the buyer an amount equal to the aggregate amounts paid by buyers or sellers with respect to any licenses which buyers license as the KCD IP.

So effectively, instead of making payments under the new KCD exclusive license, the buyer is going to get to keep it, but that results in the buyer paying for -- during the interim period, they're paying for and bearing the economic risk associated with the purchase agreement liabilities. That's -- I'm sure ESL will standup and confirm that, and that amount is in excess of the royalties that would ever be paid during that interim period. So ESL -- in short, ESL is bearing the risk associated with the administration of the purchase agreement liabilities pending --

THE COURT: During that interim period.

MR. SCHROCK: During that interim period. The avoidance actions, no claims are being released in a winddown, but of course, there's a very limited release here and we thought that was very meaningful to the estates that the litigation is very largely preserved for the benefit of the estates. That was a key compromise that we came to in accepting the bid.

Mr. Basta hit on the 507(b) claims and some of the nuances around the release, but the vendors of this company are -- the company has an excess of 10,000 vendors, so when we talk about just, you know, there's a couple of people, I think Mr. Burian mentioned that might be affected by this, by Sears closing. We beg to differ. The company's

schedules are on file. There's hundreds of millions of dollars in vendor claims. All of these parties have relationships with Sears. They will continue to have those relationships moving forward in very large part as a result of the benefits of this deal.

The claims pool is very substantially reduced, and if you take a look at the next slide, on Slide 16, we put in -- we put this chart in our reply, but it bears worth emphasizing. When you look at the recoveries to creditors overall, there is a very significant benefit in terms of the reduction of the claims pool in conjunction with this transaction even compared to a winddown as well as we -- some creditors getting enhanced or better treatment. Now, the Committee --

THE COURT: This is before litigation, in litigation of the company.

MR. SCHROCK: That's right. Litigation is not included in these recoveries in either the Committee's or the company's charts. But the wind down of this company, for the Committee, it's never been done. From the company, you have witnesses saying it's never been done by we would do our best to manage it.

We have a 365(d)(4) deadline that's on May 3rd. I think everybody would try their very best in the context of a winddown, but when you have a transaction like this that's

on the table that actually gives the company a chance -- and nothing's for certain -- but substantially reduces the claim pool, treats creditors better, saves 45,000 jobs, Judge, it's not close.

Now, the sale transaction does not guarantee administrative solvency and it was certainly a very important point for the company since the start of these cases. It's not required, okay, to sell assets. You don't have to have administrative solvency, but we believe we're administratively solvent. I think under the Debtors' analysis, they're short -- latest shortfall's $42 million.

We did not take into account any litigation claims in considering that. We have opportunities in excess of $100 million. But in the context of a winddown, there's certainly, according to Mr. Meghji, there's also no guarantee that the company will be administratively solvent. But importantly, the sale transaction, we think, gives us the highest or best opportunity.

Mr. Transier talked about, in accepting the successful bid, all of the things that they've looked at, the nature and amounts, the ability of both parties to close, the recovery the successful bid would provide to non-ESL creditors, liquidity, the alternative to this successful bid which is a winddown and the loss of tens of thousands of jobs. That alternative of liquidation, in our judgment

after consultation with numerous parties, was no9t in the best interest of stakeholders.

Now, Mr. Kamlani gave testimony around adequate assurance of future performance. It's worth noting that adequate assurance does not mean absolute assurance or guaranteed performance. They have a business plan. They have financing. They have excess availability at closing in excess of $400 million. They have a means and a business plan to move this company forward with a very substantially reduced balance sheet, much less debt. They have a smaller footprint, but they kept open the profitable stores and giving Sears a chance, Your Honor, we think it's more than warranted under the facts that are before the Court.

We go through, on the next couple of slides, which I won't belabor, just all of the uncontroverted evidence that's in favor of adequate assurance of future performance. There's nothing out there that has been put forth by the Committee that's really put this evidence into serious question and we do think that the company's witnesses, when considered overall and the Court were to make a ruling, that the company's witnesses have been interested, dedicated.

They are very credible and they were in the details compared to the high-level views that we received from the Unsecured Creditors' Committee witnesses in these cases. Your Honor, overall, I'm going to cede my time and

allow Mr. Basta to come up here and say a few words about the release, but we are very much in favor of approval of this sale. We do need some guidance and clarity from the Court around the $166 million issue in the event that we don't resolve it.

We think the issue's clear under the terms of the document, but we're prepared to move the closing providing that the Debtors are not liable -- provided the agreement's respected, rather, and the $166 million is actually taken on by ESL, but I'm happy to answer any further questions. Otherwise, I can cede the podium and respond to any objections.

THE COURT: Okay. That's fine. Thanks.

MR. BASTA: Good morning, Your Honor. Paul Basta from Paul Weiss on behalf of the Restructuring Subcommittee.

THE COURT: Morning.

MR. BASTA: Mr. Britton, my partner, will end up the clarifications to the ESL release that were discussed on the record at the beginning of the hearing. I think there's one or two issues that the Committee still has with the language and once that's done, I'll provide a closing statement on behalf of the Restructuring Subcommittee, if that's okay with the Court.

THE COURT: Okay.

MR. BRITTON: Good morning, Your Honor.

THE COURT: Morning.

MR. BRITTON: Bob Britton, Paul Weiss, on behalf of the Restructuring Subcommittee. I have a amendment to the Asset Purchase Agreement that was filed by the Debtors this morning. The revisions to the release provisions of the APA are embodied in that document. I have a copy here that I can hand up to Your Honor, if that's --

THE COURT: Okay. Thanks.

MR. BRITTON: Yeah, we have copies. Your Honor, there's a lot of changes in the amendment to the APA that I've capped for you at the back of that document, a redline that just goes to the release provisions that fall within the mandate of the Restructuring Subcommittee.

THE COURT: Okay.

MR. BRITTON: Okay. So the first thing that we were focused on, Your Honor, following the filing of the original Asset Purchase Agreement was ensuring that the actual purchase of assets didn't somehow cause ESL to purchase claims and therefore sort of get a backdoor release; otherwise, we're carved out of our release. And so we started in the acquired assets section of the APA and that's in Section 2.1P.

What we provided here is that ESL, as part of its commercial negotiation with the larger Restructuring Committee negotiated the purchase, ordinary commercial

claims against counterparties that they're continuing to do business with and we've carved Section 2.1P, the acquired asset purchase of claims back to essentially those claims and then adding clarifying language that none of the excluded assets or excluded liabilities are included in those purchased assets.

We also deleted Section 2.1T which was largely duplicative of Section 2.1P and also said that ESL was buying claims and actions. Then in Section 2.2I, Your Honor, which is the excluded assets, we provided that all claims, proceedings, and causes of action are excluded assets other than those claims and causes of action that are specifically called out as an acquired asset in Section 2.1. And we also added clarifying language here that nothing in this provision affects the scope of the releases that are set forth in Section 913.

That brings us to Section 913, Your Honor. And so in Section 913, Section B is the actual allowance of the ESL-funded debt claims per our negotiation. We've added to that in response to comments from Your Honor language that clarifies that the allowance of any ESL claims -- and ESL claims is defined as the claims that are -- the funded debt claims that are allowed by the limited release. "The allowance of any ESL claims shall not limit or preclude any claim under any applicable law or doctrine of collateral

estoppel, res judicata, claim or issue, conclusion, or otherwise."

Then you go to the actual release which is really -- you have to go to the definition of released estate claims in Subsection E2. And what we've done here, Your Honor, is clarify again that the only claims that are being released are claims that could be brought to challenge the allowance of the ESL claims. So, they're claims against ESL under applicable principles of subordination or recharacterization under Sections 363(k), 502(a), or 510(c) of the Bankruptcy Code.

We've also provided, Your Honor, that any claims against the buyer as a momentary holder of the ESL claims before the credit bid are being released and that the only causes of action that we'll retain are against ESL and ESL-related parties. The rest of this -- that's really the first five lines of the definition. The rest of this is for the avoidance of doubt, clarifying things that are not included in the released estate claims.

Among things that are not included in the released estate claims are -- I won't list them all but I'll call out -- any claims for causes of action for constructive or fraudulent transfer under 11 U.S.C. 544(b), 548, or 550 and there's new clarifying language in the parenthetical at the end that says, "Including but not limited to any claims for

damages for equitable relief other than disallowance of the ESL claims." What we've meant to clarify with that is language, Your Honor, is that we can bring fraudulent conveyance claims related to the ESL claims. The funded debt claims have been allowed. The remedy just can't be avoidance of those claims.

THE COURT: But this is all for the avoidance of doubt. I mean, it's --

MR. BRITTON: That's all for the avoidance of doubt.

THE COURT: The first sentence is the key sentence.

MR. BRITTON: Correct, Your Honor. Now, the UCC, the Creditors' Committee, and the Akin Law Firm sent across comments to these release provisions last night and we incorporated certain of those comments, and I think we still have a disagreement on at least one substantive point, which is that Akin had asked us to include in this released estate claim definition language to the effect that the Debtors -- the estates could continue to pursue claims for equitable subordination and recharacterization provided that the only remedy on account of those claims could be -- it wouldn't be disallowance of the ESL claims. It would be, presumably, damages against ESL.

Our view, Your Honor, is twofold. One, equitable

subordination and recharacterization are remedies in equitable conduct. They don't give rise to money damages. But separately and apart from that, equitable conduct that the Committee is focused on, we have preserved claims that get equitable conduct. If, in fact, there is an equitable conduct there, that's included in the avoidance of doubt language and that would include, Your Honor, claims for fraudulent transfer and actual fraud.

And we intend to continue to investigate and pursue those claims on behalf of the estate, but allowing the ability to continue to pursue equitable subordination and recharacterization claims against ESL goes directly contrary to the scope of the limited release that we had negotiated with them in order to allow the credit bids.

THE COURT: Okay.

MR. BRITTON: Thank you, Your Honor.

THE COURT: Do you want to address this now or later?

MR. QUERSHI: Happy to address it now, Your Honor.

THE COURT: Okay.

MR. QUERSHI: For the record, Abid Qureshi of Akin Gump on behalf of the Committee. It is our view, Your Honor, that what is by design supposed to happen with this release is no claims against NewCo, no claims against their allowed claims, but in every other respect we should be

permitted to pursue those claims against ESL. So really, the language that built into the release, Your Honor, was aimed at ensuring that the very same remedy that one could get against their claims for equitable subordination or recharacterization should be a remedy that is available to be pursued only as against ESL. And that is what we tried to do with the language that we suggested and that --

THE COURT: I'm sorry, but is that remedy -- that remedy is either a subordination of the claim or a recharacterization of the claim. It's not a damages remedy; right?

MR. QUERSHI: Well, it's the economic equivalent, Your Honor.

THE COURT: Well, but that's --

MR. QUERSHI: That's the point.

THE COURT: If it's damages, I understand it but if it's equitable subordination, then by definition it's a claim-related remedy.

MR. QUERSHI: It's the measure of damages on account of either equitable subordination or recharacterization. So as Your Honor is well aware, those are remedies or causes of action, I should say, where the Court has great latitude in terms of what the remedy is: how much of a claim to subordinate, how much of a claim to recharacterize. What we are saying is we should be able to

pursue ESL for the dollar equivalent, economic equivalent of whatever that amount might be.

THE COURT: But I've never -- by definition, that's not what they are. Those remedies are claim-related remedies. I mean, they affect the defendant's claim as opposed to an affirmative claim against it. This preserves equitable claims. I mean, it just doesn't preserve equitable subordination which means the claim is subordinated or recharacterization which means the claim is recharacterized either as an equity interest or maybe as an unsecured claim. But, I mean, I think the preservation of equitable damages does what you want.

MR. QUERSHI: Well, again, Your Honor --

THE COURT: Except to say that it's not -- it wouldn't be in the rubric of equitable subordination. I've never seen an equitable subordination opinion that says that you have to pay damages. Or again, recharacterization, they won't say you have to pay damages. It just doesn't...

MR. QUERSHI: Agreed. Again, the purpose of the language we were looking for was to preserve the economic equivalent, if you will, of whatever remedy that might be. That's all that it was designed to ensure.

THE COURT: I don't -- but that's creating a new -- the language that's in here preserves equitable remedies other than disallowing the claim or subordinating the claim.

That, to me, is the economic equivalent. But to say that you're creating a new form of equitable subordination, I'm not prepared to do that. It's a different -- that's like you're asking me in a contract to say that a remedy that is well defined is no longer well defined and it's an affirmative claim as opposed to a reduction of a claim or a recharacterization of a claim.

MR. QUERSHI: Well, Your Honor, the important point, I think here is if this Court's reading of the language that has been presented is that all of the equitable claims as against ESL and Mr. Lampert are preserved --

THE COURT: Well, except equitable subordination or recharacterization.

MR. QUERSHI: Right.

THE COURT: Right. Okay. All right.

MR. BRITTON: Thank you, Your Honor. Unless Your Honor has any other questions about the scope of the releases, I'm happy to --

THE COURT: No, I --

MR. BRITTON: -- Mr. Basta.

THE COURT: I mean, I read them quickly, but I think they did the trick.

MR. BRITTON: Thank you, Your Honor.

THE COURT: Okay. And I appreciate the parties

working on it to clarify.

MR. BASTA: Good morning, Your Honor. Paul Basta from Paul Weiss on behalf --

THE COURT: Oh, I'm sorry to interrupt you. So this language will also be the language in the order as far as Cyrus is concerned? Is that -- when people say it's the same thing, that what they mean?

MR. BRITTON: Yes.

THE COURT: But it would be in the order instead in this agreement.

MR. BRITTON: The scope of the Cyrus release, although outside the provision of the Restructuring Subcommittee, will be and should be the same as --

THE COURT: Although --

MR. BRITTON: -- ESL.

THE COURT: You know, I may want to add the MTN Note language. It was MTN, right? Okay. Okay.

MR. SINGH: Your Honor, Sunny Singh from Weil. It's more general in the sale order, there's just a general reservation of rights. We didn't go into all the details it was a little less prominent than the ESL.

THE COURT: Well, we say that the release is no broader than as set forth in Section 9. --

MR. SINGH: Right.

THE COURT: Yeah, right.

MR. SINGH: Yeah, we could add it.

MR. BRITTON: I think we should put in the MTN --

THE COURT: Right, we should put in the MTN, too.

MR. SINGH: And I'll just confer with counsel.

THE COURT: Right. Okay.

MR. BASTA: Your Honor, Paul Basta from Paul Weiss on behalf the Restructuring Subcommittee. I will try to avoid any overlap with Mr. Schrock. This Subcommittee statement, Your Honor, Mr. Schrock walked through the execution risks associated with this deal. Our Subcommittee statement is predicated on ESL not reneging on the $166 million assumption. That was a critical component of the Subcommittee's decision to provide the credit bid release and so this statement is on the assumption that ESL is going to honor the agreement in that respect.

The decision before the Restructuring Subcommittee in this case was whether to provide a release to ESL in order to facilitate a going concern transaction that would maximize --

THE COURT: Can I interrupt you? I'm sorry. Let's assume -- I hope this doesn't happen, and I assume it won't happen, but just hypothetically assume that the deal closes. ESL doesn't reimburse for the debts listed on Schedule 1.1G. It's ultimately determined that the deal is breached, right?

MR. BASTA: Right, yes.

THE COURT: Is the release -- the release isn't effective --

MR. BASTA: Release is not --

THE COURT: at that point, right, because they've breached the agreement?

MR. BASTA: Release is not effective.

THE COURT: Okay.

MR. BASTA: But, Your Honor, we wanted to effect the -- when we looked at the release, for a long time the release was on the back burner because the concept here was we needed a deal. We needed a viable deal. It only made sense to talk about a release in connection with the viable deal. So the 166 from the Subcommittee's perspective was critical to get to a deal that was viable and the release was predicated on that assumption.

THE COURT: Okay.

MR. BASTA: So the decision before the Subcommittee was whether to provide a release to ESL in whatever form we could negotiate in order to facilitate a going concern transaction or, alternatively, to choose liquidation. That was it. Release deal or liquidation. And ultimately, the Restructuring Subcommittee determined in good faith to approve a limited credit bid release to facilitate a reorganization and came to the view that that

was better for the estate than proceeding to a winddown.

THE COURT: Can I just -- I think I have the chronology here, but all of the ESL proposals that the Restructuring Committee, the Subcommittee rejected contained a general release, right?

MR. BASTA: Yes.

THE COURT: Only the one that was accepted had this --

MR. BASTA: Right.

THE COURT: -- limited release.

MR. BASTA: Right.

THE COURT: Okay.

MR. BASTA: Your Honor, if I can walk you through that for one second. On December 5th, 2018 was the first indicative bid by ESL and it contained a broad ESL release and on December 9th and 12th, it was rejected in writing by both the Restructuring Committee and the Subcommittee. On December 28th bid by ESL, it contained a broad release and it was rejected on January 4th. On January 6th bid, there was also a broad release and it was rejected on January 6th. On January 7th, Cleary sent a letter threatening the Restructuring Subcommittee with breach of fiduciary duty if they did not accept the ESL bid.

On January 9th, ESL put a bid on the auction record and we rejected it because it contained a broad

release, among other things. It wasn't until January 15th, late in the evening -- I'm sorry, January 15th there was yet another bid that also contained a broad release that was rejected by the Subcommittee. It wasn't until the limited release was accepted by ESL and other components of the deal were improved that the Subcommittee agreed to provide the limited release.

We believe that the limited release is the solution to this case. If Your Honor remembers, in the early bidding procedures, there was a requirement that in order to credit bid, ESL was going to have to cash backstop any credit bid. And that was where we were for a long time and ESL indicated there would be no going concern with cash bid, so we had to figure out a way to facilitate a credit bid if we wanted to achieve the benefits of a going concern, and so we came up with the bifurcated structure and the bifurcated structure is one where we retain the valuable causes of action while allowing the company to receive the benefits of a reorganization.

We think that's the linchpin of the case and the obvious benefit of moving forward. There were a number, Your Honor, of less obvious benefits that came out of the Subcommittee's negotiations around the credit bid. The credit bid was the key and there was substantial improvements to the deal in addition to the limited release

that stemmed from that credit bid negotiation. They closed the administrative insolvency gap by hundreds of millions of dollars. The deal provides, in our view -- when we looked at this, we always look at, is the going concern better than the winddown, not is the going concern good. It's is it -- provide a proportionally -- a incrementally better alternative.

Our analysis showed that in the final bid, that third-party secured creditors are benefitted compared to a winddown and that's not including, obviously, ESL to the tune of $152 million. It's our analysis that general unsecured creditors that are getting assumed under the deal which include protection agreement and other consumer-related claims of $524 million are getting paid under this deal and they would not get paid in a winddown.

I'm going to get into some more detail about that later, but earlier iterations of the contract from ESL had it a condition to the assumption of the protection agreement liabilities that they be reaffirmed by the consumer and we were able to get that out of the contract to make that an absolute requirement to assume those liabilities, and that allowed us to value that as a contribution to the estates.

There's a $621 million avoidance of additional administrative claims in a reorg versus a winddown, which we think is very significant and there are jobs that are being

preserved. There's also a substantial limitation in ESL's ability to recover from litigation proceeds with respect to its deficiency claims.

We negotiated so that there would be no right of ESL to share on any Land's End or Seritage litigation, no right of ESL to share on any litigation relating to any ESL misconduct, and we were able to cap ESL's 507(b) claim at $50 million which -- of is there's other non-ESL litigation recovery, their 507(b) claim is capped.

The decision to provide the limited release is coming from a process where Mr. Carr and Mr. Transier faithfully discharged their fiduciary duties. There's some allegation in the Committee's papers that Mr. Carr and Mr. Transier were hand picked by Mr. Lampert. There's no evidence in the record to support that. In fact, the evidence in the record is that they were introduced to the board by Mr. Schrock and that they had -- the evidence is clear that they had no prior relationships with ESL.

Your Honor observed the demeanor of Mr. Transier and Mr. Carr in person and I think anyone who watched that testimony would see that they were not pulling any punches whatsoever and were faithfully trying to do what was best for the estate. And of course, Mr. Carr and Mr. Transier have found that there's hundreds of millions of dollars of valuable claims against ESL and repeatedly rejected ESL's

bids that contained a release even in the face of litigation threats from ESL.

It's also unmistakable that Mr. Carr and Mr. Transier satisfy the duty of care. The Debtors set up a purely independent Subcommittee because it could see what was coming down the pike, and if there was any way to get this through given the conflicts involved, you needed a truly independent Committee.

And Mr. Carr and Mr. Transier directed all of the professionals for the Subcommittee, including A&M and Evercore, to do a massive amount of work investigating the claims up front so that we would be in a position at the auction to assess the value of those claims and all of that work led to the bifurcation approach that was an informed approach so we could present to this Court a solution that would allow a reorganization instead of making a liquidation a fait accompli.

Mr. Schrock talked about the 58 Restructuring Committee meetings, many of which the Subcommittee's professionals attended. There were also three times a week calls of the Subcommittee and a myriad of other one-off conversations on the process. Mr. Carr and Mr. Transier, as you could see, were not passive recipients of professional advice. They were deep in the weeds on what the numbers are. The Committee presented the Court with texts of Mr.

Carr. What those texts show is that Mr. Carr wanted to get to the right answer and was not satisfied with the numbers that were coming out of the professionals upon which to make a decision, so he didn't make a decision until those numbers settled down. That is the embodiment of satisfying the duty of care.

Your Honor, I have two slides I'd like to hand up. Mr. Carr and Mr. Transier had a deep understanding of what fiduciary duty means in an insolvent situation. If you look, I've given Your Honor a quote from Gheewalla. This is, of course, the seminal decision where this is arising in the context where the Delaware Supreme Court is concluding that there's no separate duty -- fiduciary duty of a board to creditors.

And if Your Honor reads the sentence, it says, "To recognize a new right for creditors to bring direct fiduciary duty claims against those directors would create a conflict between those directors' duties to maximize the value of the insolvent corporation for the benefit of all those having an interest in it and the newly directed fiduciary duty to individual creditors."

This is a sophisticated sentence that understands the difficult job that directors have to undertake because there are numerous constituents that have an interest in the corporation. So by saying you have a duty to the

corporation, you have to take into account the impact on all of its constituents and this is different than a Creditors' Committee who has a duty to its unsecured creditor constituency.

And so if you look at it through that lens where the Restructuring Subcommittee had a broader constituency group to consider than the Unsecured Creditors' Committee, I've given the Court a slide that talks about what the release consideration that we considered separate for the reason to provide the limited release. And if you go through this, Your Honor, I think it's very compelling.

We're getting $35 million of cash. We're getting $152 million to third-party secured creditors. We're getting $453 million of assumption for protection agreement liabilities. We're getting gift card liability assumption of $13 million. We're getting $68 million of assumption of Shop Your Way liabilities. We're avoiding $621 million of administrative expense claims. We are preserving the litigation against ESL and other defendants. We're getting the cap on ESL recoveries and we're preserving tens of thousands of jobs.

THE COURT: Other than the cap, now this is part of the sale consideration. Your point is that the sale wouldn't have happened without the credit bid.

MR. BASTA: To get a release under Drexel, there

needs to be consideration. But there need to be --

THE COURT: No, I --

MR. BASTA: -- consideration, it needs to be more than the winddown.

THE COURT: I -- well --

MR. BASTA: So in other words, if they had showed up with a deal --

THE COURT: But the winddown includes what you carved out of the release, so I guess I'm looking this a little differently which is that there's value that ESL is paying for the Debtors in addition to the credit bid. But I view that as value that I would measure against a winddown. The alternative. I wouldn't also measure it as consideration for the limited release, but I understand your point which is that that value wouldn't be there without the limited release, which is a little bit of a different thing.

MR. BASTA: Well, Your Honor, I think -- respectfully disagree which is that if they had showed up with $35 million for the credit bid release, we would not have provided it.

THE COURT: Well, no, because the whole deal wouldn't make sense.

MR. BASTA: The whole deal wouldn't have made sense.

THE COURT: Right.

MR. BASTA: The whole deal wouldn't have been better than a liquidation.

THE COURT: Right.

MR. BASTA: You had to measure whether to give the release on whether there were benefits to the company --

THE COURT: Right.

MR. BASTA: -- the liquidation.

THE COURT: And it's a limited release.

MR. BASTA: And it's a limited release.

THE COURT: Right.

MR. BASTA: And so I think the question that I'd like to focus in conclusion, Your Honor, is why does the Subcommittee value these things as important but the Creditors' Committee does not value them as important? Because I think that's the key as to what's really going on in this case. If Your Honor looks at whatever the Committee -- Creditors' Committee describes this deal, they say it's $35 million for the release.

They never acknowledged that there were very significant unsecured creditor constituencies that are doing better in this deal than what they would do in a winddown. In a winddown, the protection agreement liabilities would not get paid, gift card, consumer, jobs. In fact, Mr. Burian said that the Creditors' Committee is not supposed to look at jobs. I guess he views employees -- I think he said

that they're not prepetition creditors or that in our vibrant economy they can go and find another job, so he didn't even view them as a constituency that the Unsecured Creditors' Committee in its lens needs to consider.

And I think this is the key. It's just why doesn't the Committee view these benefits as being important enough to support this deal, and I want to suggest to the Court that there are four reasons and that none of those reasons warrant denial of this transaction.

The first is that none of the unsecured creditors that are on this list as receiving a benefit are on the Committee. The Committee is not dominated by trade. It does not have employee representative. It does not have consumer representatives. The Committee constituency is not actually getting these benefits.

The second reason, I think, is that I think the Creditors' Committee is focused on equitable subordination as an important remedy for them because they can hold that debt essentially in the case and recover from the liquidation proceeds and subvert the priority scheme. And I understand that as an important consideration for the Committee, but from our perspective when we've preserved other remedies by preserving the litigation, we don't think that preserving equitable subordination as an independent remedy is a reason to thwart a reorganization.

The third argument that they've made -- and Your Honor asked Mr. Schrock about it -- relates to the unencumbered real estate value and it's that in a liquidation if you believe that the unencumbered real estate value could get a lot of value, then your whole analysis as to whether reorg versus winddown would change. But the way the Subcommittee looked at that is that in the winddown analysis, the unencumbered real estate was consumed by the newly created administrative claims.

So the way we looked at it is when you compare the two transactions, the unencumbered property wouldn't flow down to unsecured creditors to give them a recovery. Now, I understand that there's a debate about what the value of that is, but the Restructuring Committee's professionals reported on what their view of the valuation of those assets was and that that value would not result in a recovery to the unsecureds.

THE COURT: Unless you hit a home run.

MR. BASTA: Unless you hit a home run.

THE COURT: Well, not on the real estate, on the litigation against ESL including under Section 507(d) and 506(c).

MR. BASTA: Yes.

THE COURT: They basically assume out any claim there.

MR. BASTA: They assume -- no --

THE COURT: They would be a super priority claim under 507(d).

MR. BASTA: Right. Right. And then the last thing that I think they're focused on is they could say they don't believe in NewCo, and if you don't believe in NewCo then maybe the benefits that we are considering that would be assumed by the new company shouldn't be valued because the company is not going to survive. I would say, while they have questioned it, at no point in the process has the Unsecured Committee ever said, this deal gives valuable consideration to some of our constituencies. Let us work the contract to make the contract better to preserve these benefits.

The entire time, the focus has really been on just causing a liquidation. They announced that in the very beginning of the case. Irrespective of --

THE COURT: Well, maybe here that's the best negotiating strategy. I don't know.

MR. BASTA: Well, that --

THE COURT: That we could leave that for business schools.

MR. BASTA: We can leave that for another day. I would say --

THE COURT: Okay.

MR. BASTA: -- Your Honor, that the Subcommittee's professionals and the Restructuring Committee professionals believe that there's a reasonable prospect that NewCo can succeed and that in light of all the benefits that can be achieved and the retention of the litigation, that it should be approved.

Three legal points, and then I'll sit down. We're going to defer to the Restructuring Committee on standard of review. We would point out, Your Honor, that even if the Court applied the entire fairness test to this transaction, we think that this is entirely fair. There's been tremendous Court oversight through the entire process. We have a truly independent Subcommittee and we believe that entire fairness test is about a fair process and fair price, and given the auction process as well as the transparency with all the parties, that even if entire fairness test applies, it has been satisfied.

Two cases I want to refer to Court to, as Your Honor considers this. The first is a case that says that the estate has the right to settle 502(d) or release 502(d) claims. There was some reference in the Committee objection. It is In RE: Foundation of New Era Philanthropy, 1996 Bankruptcy Lexis 1829 (1996). And the second is the Applied Theory case from the Second Circuit which holds that equitable subordination claims are

derivative especially in the context where the complaint that is the grounds for equitable subordination harm all of the creditors equally and therefore our view is that we have an ability -- because they're derivative, they belong to the estate to release them or settle them as part of this transaction.

THE COURT: Okay.

MS. SONGONUGA: Your Honor, (indiscernible) for Court Call. For the benefit of those appearing through Court Call, that have objections in the agenda that have not been disposed of. Will we have an opportunity to address the Court regarding those objections?

THE COURT: Yes.

MS. SONGONUGA: Thank you, Your Honor.

MR. BROMLEY: Good morning, Your Honor.

THE COURT: Morning.

MR. BROMLEY: Jim Bromley from Cleary Gottlieb on behalf of ESL. I stand here before you today, Your Honor, as an advocate to ask you to approve the transaction that's before you. I can't help, however, but feeling a little bit like a character from that Monty Python skit where somebody walks in looking for an argument and he finds himself getting hit on the head lessons.

This is a difficult exercise, Your Honor. We are being criticized both by the Creditors' Committee and, to a

certain extent on his $166 million, by both the Debtors and the Subcommittee. It is true that what happened in this case from the very beginning was that ESL has indicated very clearly that it was interested in a going concern transaction. It is also very true that from the very beginning, ESL indicated that it wanted releases in connection with pursuing that and the ability to credit bid.

ESL lent the company over $2.6 billion in the prepetition period, of which about $2.4 billion was secured. The vast majority of that effort was -- well, the entire majority of that effort was made to keep this company in business and to allow it to avoid the very feed frenzy that we're facing today here in Bankruptcy Court. But while it might've been on a back burner for Mr. Basta, it's important for everyone to realize from the very beginning it was on the front burner for ESL.

ESL has been criticized substantially and consistently throughout the case by the Creditors' Committee and it is important for us to state on the record that we uncategorically deny any of the allegations that have been made. We believe that the releases that are being provided are appropriate under the circumstances, and we also believe that the claims being retained are worthless. So from an administrative solvency perspective, Your Honor, we don't believe that the claims retained have any value. We

understand that there's a difference of opinion there, but it is important that before we go any further that that claim and position be made clear.

I'd like to turn to the one hundred and sixty -- yes? Something to say, Your Honor?

THE COURT: No, go ahead.

MR. BROMLEY: Okay. I thought you had a question. With respect to the $166 million, both Mr. Basta and Mr. Schrock made comments that were somewhat inconsistent. First, they said they believe the contract is in their favor and they are ready to close. And then they said they're ready to close so long as Your Honor gives some guidance or makes some kind of decision that indicates that they are right and we are wrong.

We are ready to close based on the contract as written, regardless of the ultimate interpretation. But we believe that the ultimate interpretation is not for here today.

THE COURT: It isn't. Under Orion Pictures, I don't have the authority to decide that issue; although, I do have to evaluate as, in essence, whether it's reasonable to assume the Debtors' interpretation because it's clear to me that the Debtors don't believe that the deal is worth pursuing unless their interpretation is right. So I'm not able to make a decision today, as the Second Circuit held in

Orion Pictures. But on the other hand, it needs to be evaluated as Judge Chapman recently did in one of her cases.

MR. BROMLEY: And it's in that context, Your Honor, that I feel that I do need to address it to a certain extent. There are lots of information that is not before the Court, but what is before the Court is the contract and the schedules. And with great fanfare, the Debtors today told you what was on Schedule 1.1G which is the number $166 million. That, I think is fair to say, not particularly enlightening guidance as to the specific of accounts payable that are supposed to go forward, and that is exactly the issue.

The way the contract is written, Your Honor, and the way our bid letter went in, the way Mr. Kamlani testified, consistently from our perspective is that with respect to the $166 million, it is about accounts payable with respect to product that is ordered before the closing and delivered after the closing.

THE COURT: Well, it just doesn't say that.

MR. BROMLEY: Well, Your Honor, actually we believe it does.

THE COURT: Well, okay. The schedule doesn't.

MR. BROMLEY: The schedule has to be read together with 1.1F and 1.1G and they both say $166 million and --

THE COURT: Other payables.

MR. BROMLEY: And other payables.

THE COURT: Which the definition refers you to the schedule.

MR. BROMLEY: And ordered inventory, the way the line is written, ordered inventory in our view is clearly included within other payables.

THE COURT: Okay.

MR. BROMLEY: So with that, Your Honor, regardless of the ultimate outcome, ESL stands before you today ready to close on the basis of the contracts as signed. With respect to the arguments that have been made and will be made, I think that there's a couple of points that we want to add to those that have been made by Mr. Schrock and Mr. Basta.

When viewed through the appropriate lens, Your Honor, there's really no question that all of the standards for approval have been met and exceeded in this case. For a buyer, one of the most important aspects of the sale order is to find in good faith and with respect to a participant in these proceedings like ESL, that is important -- critically important because of all the allegations that have been made --

THE COURT: I'm sorry. What is it?

MR. BROMLEY: Good faith.

THE COURT: Oh, okay. Right. I just didn't hear

you.

MR. BROMLEY: Sorry. Sorry, Your Honor. And the evidence is replete with evidence -- the record is replete with evidence of good faith, that from the very beginning, prior to the petition date, Mr. Lampert who had been the CEO resigned. The Restructuring Committee was appointed. The Restructuring Committee was -- and the Subcommittee in particular were vested with dual roles, to both investigate potential claims that may exists as well as to evaluate any transactions that would involve ESL.

And there's no evidence at all in the record that anything happened where either Mr. Lampert, Mr. Kamlani, or anyone else representing ESL had any influence over the Debtors' process, any influence over the Debtors' business plan, any influence over the Debtors in the post-petition period at all. Indeed, Your Honor, if anything the evidence is overwhelming with respect to the intensity of these negotiations.

This is a deal that has fallen apart and come together on numerous occasions. The intensity and, frankly, contentiousness of the negotiations that have taken place are marked. They are -- when at least two of the witnesses, Mr. Transier and Mr. Kamlani referred to the auction as a four-day night, that really is a perfect encapsulation of the exercise that went on during that week at Weil Gotshal's

offices. Our offers were rejected repeatedly. They were rejected formally and informally, and at every moment in time, we came back to the table to put more consideration on the table.

With respect to the releases, we did start off looking for a global release. That was our intention from the beginning and that was our desire. As the transaction continued to move forward, we understood that in order to make this get over the finish line, that we needed to identify an opportunity to negotiate a more limited release and it was in that context that on the night of the 15th and into the early morning of the 16th that we sat down and were able to cut that deal.

It is what is reflected in the document. It's reflected in the comments of Mr. Britton and certainly with respect to the attempt by the Creditors' Committee to recapture certain of the release elements, particularly with respect to equitable subordination and recharacterization and disallowance. We reject that entirely. That is not the deal and we have to have the ability to credit bid or the transaction cannot go forward.

And that includes, frankly, the release -- the allowance of the claims in their entirety. The cabining of the opportunities for those claims to recover with -- that Mr. Basta described were hard fought negotiations and

provide, we believe, both protection for the estates as well as protection for ESL. But it was protection that was hard fought in the context of a global transaction.

Your Honor, you've heard from Mr. Kamlani who's the president of ESL with respect to the business plan and there's been a lot made by the Creditors' Committee about the going forward business plan of NewCo. The criticisms of the business plan, I think, are important to take for a moment. One of -- the Creditors' Committee, frankly, relied almost entirely on their purported expert, Mr. Kniffen. He did not appear in Court and was not cross examined. The parties have relied on the designations of his testimony.

But I think it is important to look at those designations because Mr. Kniffen is by no -- in no way, shape, or form an expert on anything. Mr. Kniffen is a pundit on cable TV. He has worked in the retain industry but hasn't been involved in it in any way, shape, or form for about 15 years and he hasn't even set foot in a Sears store in a year and a half at least.

His expert opinion is no more worthwhile than if we brought in a parade of Sears customers who said they like Sears and they like Kenmore products and they enjoy shopping at Sears.

And when you take Mr. Kniffen off of the table, we believe he wouldn't survive a Daubert challenge in any

circumstance that we do not bore the Court with it. You have simply nothing on the side to criticize the g-forward business plan.

Mr. Diaz as well relies almost entirely on Mr. Kniffen's assumptions. He does the math for Mr. Kniffen but if it wasn't for Mr. Kniffen, there'd be no math for Mr. Diaz to do. And so if you take both Kniffen and Diaz off of the table, which we believe is appropriate in light of Mr. Kniffen's obvious incapacity to be qualified as an expert, there's simply no evidence whatsoever that the business plan for NewCo going forward is anything other than appropriate.

Notwithstanding that, Your Honor, Mr. Kamlani was very clear as to the opportunities that are being provided with respect to the go forward business plan. The go forward business plan is not a plan to close stores and fire employees. The go forward business plan is a plan to maximize the opportunities provided by the Sears ecosystem. That includes the Innovel and SHS, Sears Home Services network to transition from larger footprint stores to smaller footprint stores and to transform this company. To transform this company, which is exactly what ESL has been trying to do for the past 13 or 14 years.

Now, the fact that the company has not succeeded is obvious because we're here in Bankruptcy Court. But when we're looking at the commitment of ESL to Sears, it's

important to contrast the commitment of ESL to Sears and the commitment of others in other situations. There was testimony yesterday about Toys "R" Us. The private equity sponsors in Toys "R" Us did a leveraged buyout of the company and abandoned it.

Mr. Lampert and ESL have been with Sears and believers in Sears, long-term contrarian investors and they are continuing to put money and resources behind this business model and this plan. Now, we can sit here and criticize that business decision, but we should not misinterpret that business decision for some kind of evil intent. Mr. Lampert's dedication and ESL's dedication to Sears really is without question and the idea that we're doing anything other than to try make this company succeed and succeed going forward is completely belied by the other options on the table.

If this was an exercise in trying to obtain real estate and liquidate that real estate, we would simply be credit bidding the liens that we have with respect to the real estate. If this was an exercise to keep Sears alive to protect our investment in Seritage, there would've been no reason to have put two point five or six billion dollars into Sears instead of into Seritage, the investment of which was only about $750 million.

We're dealing with a universe of incompatible

positions, right? The Creditors' Committee right now says we're getting too much value and we're not paying enough for it. And at the same time, they're saying that that very NewCo that's getting too much value and not paying enough for it is going to fail because it's inadequately capitalized and incapable of providing adequate assurance of future performance.

Quite simply, the Creditors' Committee can't have it both ways. We can't be stealing assets and unable to pay our creditors when those debts come due doing forward. We're doing nothing with respect to taking assets other than to incorporate them into a valid and viable going forward business. And every time the Creditors' Committee stands up and talks out of both sides of its mouth, we have to recognize it for what it is, right?

Creditors' Committee is dominated by Simon Property, their chair, the largest real estate mall owner in the country, and what are we doing? We're sitting here criticizing the real estate sale process. I submit, Your Honor, that Simon knows more and better about every one of the properties in their malls than anyone else, including Sears. So if they wanted to be here and be bidding against this transaction, they have every opportunity and that goes for every other large real estate developer.

The idea that this Sears process has been going on

under some sort of cover of darkness is just ridiculous. Sears has been under a microscope for years. Mr. Lampert has been under a microscope for years. This entire bankruptcy has been under a microscope with live blogging the moment anything is said, and including almost instantaneous reports of whatever is going on in chambers conferences, which we find frankly outrageous.

There's nothing hidden in this case. Anytime something is said, it is broadcast almost immediately and the idea that we're doing something under cover of darkness is frankly outrageous. Now, Your Honor, I am -- I want to talk a little bit about the reasonableness of the settlement and the 9019 standards.

I know that Mr. Basta covered it and that Mr. Britton described the release, but it is very important that when we're taking a look at this that we're not conflating things, right? The 9019 standard for approval of a settlement which we understand is part and parcel of the 363 standard for the sale, is such that we have to take into account the strength of these claims but not have a minitrial with respect to the claims.

You've heard from Mr. Carr, from Mr. Transier. You've seen from the pleadings submitted by the Restructuring Subcommittee that they have conducted an extensive investigation. They have taken a look very

specifically at these equitable subordination, disallowance, and recharacterization claims and they have some to a reasoned conclusion that the consideration being provided both in the form of the $35 million as well as all of the other assumptions of liabilities is more that enough to justify this release.

And I think it's important for a moment to stop and go back to Mr. Basta's timeline. It is true, absolutely, we wanted a complete release all through the process. We did not get to the point where we were willing to engage on a more limited release until the time of the auction. And it was in that same period of time in conversations with the Debtors and the Subcommittee that ESL did two things.

One, decided that it would be willing to put a proposal on the table or consider a proposal, depending on which point of view you have with respect to a more limited release, but at the same time also assuming substantial amounts of liability -- substantial amounts of liability and increasing the overall value. Mr. Kamlani testified yesterday uncontradicted that the bid that went in on the 28th of December, the bid deadline, compared to the bid that was accepted had a difference, a positive increase in value of $800 million.

So between the time that our bid went in on the

28th and the winning bid was selected in the early morning hours of the 16th, subject to documentation, we did two things. We increased the amount of consideration by approximately $800 million and we also agreed to the more limited release. Now with respect to those -- and a lot of this ties into all different pieces, but another piece of this is that the same time that we were assuming liabilities, we were addressing issues that dealt with the so-called allocation with respect to unencumbered assets.

I think Your Honor's math is exactly right. We've got $5.2 billion of consideration, $1.3 billion of credit bidding so that means there's $3.9 of other consideration. But just to put a finer point on that to give you a couple of data points, the protection agreements that had been discussed, what are the protection agreements, right, and what is the value with respect to that? It was in the context of that December 28th to January 17th period that we increased our bid to take on responsibility for the entirety of the protection agreements.

The protection agreements are if you go and buy a stove or washing machine at Sears and they ask if you want an extended warranty and you say yes and you pay $300 for it, something along those lines. That is an obligation of Sears to continue to provide service and come out to your home and fix these appliances to the extent they break.

Like any insurance, it's a bet. It's a bet that the quality of the product is going to be such that you're not going to have to spend nearly as much in repairing the appliance as you did to buy the protection. And so the accounting for these is obvious when you describe it, but a little tricky from a distance.

There's about a billion dollars' worth of liabilities right now for protection agreements. It's a little less than a billion, but it's close enough to a billion. And so the question becomes, well, we took on the responsibility for that in this transaction. The present value of discharging the obligations is somewhere in the neighborhood of 400 to $430 million. However you view it, we are taking on a substantial obligation. If Sears liquidates, that's a billion dollar claim. It's a billion dollar claim because everybody who bought those protection agreements will no longer have protection and have a billion dollars' worth of claims against Sears. The fact that they could be serviced for $430 million is irrelevant if there's no one there to service it.

So we're taking on the obligations of about a billion dollars. Yes, it'll cost us about 430 to service it, but we are takin off of the liquidation balance sheet of the Debtors approximately a billion dollars' worth of liabilities.

There are several other instances where the bid was improved substantially during that period of time, all of which accrues for the benefit of the –- you know, for credit with respect to the non-encumbered assets.

Also with respect to the non-encumbered assets, Your Honor, there's an issue that goes into liquidation, the liquidation analysis. And I think as Your Honor has appropriately said, what we're doing is comparing this transaction to the opportunity presented, maybe the less-desirable opportunity hopefully, of liquidation. And when you look at the liquidation analysis, including the one that was just presented to Your Honor by the Debtors in their deck, what you're looking at there is a question of the liability with respect to the priority scheme on how obligations flow through.

In this circumstance, this transaction that is being proposed to be approved is substantially better than the liquidation alternative, and it's substantially better than the one that the Debtors have shown you.

If you have their deck, Your Honor, I can direct you to -- this is Page 16 of their deck. Right? It says the benefits of the sale transaction outweigh an orderly wind down. And it's got two columns; the wind down column and the sale transaction with assumed creditor recoveries under each column. The first column, under wind down, is

the liquidation alternative. So looking at that first category, administrative and other priority claims, there's an assumed recovery under that liquidation scenario of a hundred percent.

That's simply incorrect, Your Honor. Because if you go one, two, three, four, five lines down, there is a line for second lien 507(b) claims, and it says 41 percent. Now, the 507(b) claims, Your Honor will recall, relate to the second lien facility that has second lien positions with respect to all of the collateral securing the first lien ABL. There has been a diminution in value since the filing of the case. The amount of the collateral, the amount of the collateral as of the petition date versus the amount of the collateral today is substantially diminished. And the diminution was used to fund the estates and the operations.

The 41 percent number is incorrect because the 507(b) claims are senior, both by statute and by the DIP order that Your Honor entered to the administrative and other priority claims.

So whatever those amounts are, and we understand that the Debtors may disagree with our point of view, which we think is in the neighborhood of $700 to $900 million, those 507(b) claims are entitled to recovery before and above the administrative and other priory claims.

So what we're talking about here when you flow

that through is that the administrative and solvency in a wind down scenario is enormous. And the only way it's not is if you ignore the law and if you ignore the orders that this Court has entered with respect to the 507(b) claims and the diminution of value since the petition date.

THE COURT: At least you'd have a fight over it.

MR. BROMLEY: We would certainly have a fight about it, Your Honor.

THE COURT: Okay.

MR. BROMLEY: And there's a lot of fights to be had. Hopefully that's not one of them. But on that one we feel good that the statute tells us very clearly, and so does the order that Your Honor entered.

So, Your Honor, with respect to the -- going back into the analysis of the release and, you know, the subcommittee and the Paul Weiss brief made very clear, I won't belabor the point, both equitable subordination and recharacterization are extraordinary remedies. We don't believe that there were facts or circumstances that would give rise to any valid claim. But in the context of trying to make a commercial transaction work here and because of the huge desire that ESL has to try to go forward and make this company succeed in the future, we were willing to put the settlement proposal on the table. But it doesn't mean that you shouldn't take into account the fact that the

caselaw is very clear. Those are extraordinary remedies. They do not come across any of our desks in a fully-litigated fashion very often. And the reason for that is they are incredibly factually intensive and the standards are very high.

Your Honor, there's been some criticism made about the conduct of the auction and whether it was open and fair and transparent. We were a mere participant, and to an extent there was nothing that we did to have any role in trying to keep anyone out or anyone in. When we showed up at Weil's offices for the auction, we had no idea who would be there or who wouldn't be there or what we were bidding against. We were not provided with any advanced notice of any competing bids, and frankly as we stand here today have no idea who bid what for anything, notwithstanding demands that we had made for that information.

THE COURT: You're going to have to let other people who want to object to have a chance. I mean, I don't know how much longer you're going, but --

MR. BROMLEY: I'll be wrapping up, Your Honor. I'm sorry.

One thing I do want to say is -- you know, I'm not going to go into any detail on refuting the allegations that have been made in the creditors committee's pleadings. Thirty or 40 of their pleadings were filled with accusations

about my client, about actions that they may or may not have taken in the pre-petition period. We don't view this to be the time or the place to be dealing with any of those, and would hope that Your Honor would be of the same view. To the extent that Mr. Qureshi's colleagues feel a need to get into that and Your Honor allows it, I would want to reserve time to respond to that. Let me just see if I have anything else here.

So I think in light of the issues that have been covered by my colleagues from Weil Gotshal and Paul Weiss, that's all I have for Your Honor today. Again, reserving my rights to the extent that there is a need. Thank you.

THE COURT: Very well. What? I'm sorry. I hope your leg hasn't gone to sleep.

MR. SELTZER: Your Honor, I'll only be about two minutes.

THE COURT: Okay.

MR. SELTZER: Very quickly. Richard Seltzer of Cohen, Weiss, and Simon for the United Auto Workers, the United Steel Workers, and Workers United SEIU. These three unions were also creditors representing employees of five distribution and soft goods centers of the Debtors in Pennsylvania, New York, and California.

And the first thing I'd say I think it's important listening to this morning, that the Debtors and the buyer if

the sale is approved, be in excellent communication with employees about their status. It sounds like they're going to continue being employees of the Debtors for some period of time under services leased. Whatever the story is, I think it's important that that be communicated to the employees.

THE COURT: I agree with that.

MR. SELTZER: We've been in communications with the Debtors, and it's our understanding that the five locations that we represent people at will be sold, and probably three of them will continue operations.

We represent -- the unions I represent represent hundreds of workers whose jobs are important to them, their families, and their communities. And we hope that the Debtors and the buyers will have the sense to assume the respective collective bargaining agreements that are on the list of agreements that may be assumed because we think that makes sense for labor stability, business stability, and equitable treatment.

One of the main goals of Chapter 11 is to preserve jobs. The one case that the creditors committee cited for sort the opposite proposition was the in re After Six case of Judge Scholl in Philadelphia. And the case actually stands for exactly the opposite. It may be limited in its analysis, but it certainly held that a Debtor exercising its

business judgement can take into consideration the preservation of jobs in a sale.

The point I ultimately rise to make is simple but telling. While the unions we represent do not condone some of the kinds of activities that at least are alleged in the creditors committee's papers, and while we do not look at life through rose-colored glasses, either for the past or the future, at the end of the day the unions' members and other employees will either have the opportunity to continue their jobs working for Sears or Kmart, or they'll be out of work. In the real world of real, working people and real jobs, not the world of armchair experts who sounded to me like we're thinking about this ultimate universe. These jobs are vital, they're important, and they're not easily replaced. There was no other offer that even suggested the possibility of maintaining jobs.

And so the UAW, the USW, and Workers United SEIU, while supportive of any efforts to improve the offer or improve the lot of employees or improve the value of the estate, support this sale. Thank you.

THE COURT: Okay, thanks. Okay. Why don't I hear from the committee and any other objectors.

MR. QURESHI: Thank you, Your Honor. For the record, Abid Qureshi, Akin Gump, for the committee. Your Honor, may I approach with a short presentation?

THE COURT: Sure.

MR. QURESHI: Your Honor, before I get into the presentation, there's just a couple of things that I'd like to respond to from Mr. Basta's remarks initially. And the first is -- and we'll say I'm going to approach this a little bit differently. Unlike Mr. Basta and Mr. Schrock and Mr. Bromley, I'm not going to testify from the podium, which I think Your Honor heard a lot of. I'm going to focus instead on the evidence that's in the record. But I do want to respond to the allegation concerning the committee and the committee's decision-making process.

And the suggestion has been made that somehow this committee is dominated by landlords. It's not, Your Honor. The committee's membership is two landlords, two trade creditors, one indenture trustee, as well as the PPGC. Your Honor, every member of the committee and all of the committee's professionals take their fiduciary duties very seriously, and every action the committee has taken in this case has been with the unanimous support of the committee members.

Secondly, Your Honor, Mr. Basta suggested that committee has never said -- let us work the contract I think was the phrase he uses. And frankly, Your Honor, given what transpired here, I find that comment really hard to take. Your Honor, there's record evidence that at this auction the

committee was not consulted. Yes, it is true --

THE COURT: I took what Mr. Basta said with a grain of salt. And frankly, I don't need to get into committee deliberations. I'm just evaluating what's in front of me, and motivations are not particularly relevant to me.

MR. QURESHI: I agree wholeheartedly with that, Your Honor. I --

THE COURT: And I also take -- I mean, it sounded facetious, but I also take seriously the point that the committee being a total pain in the neck may be the best negotiating strategy. So I don't want to get into that.

MR. QURESHI: I raise it only, you know, because the consultation provision is there so that the committee can be used to improve the deal. And we'd love nothing more than a better deal. We don't have -- we have the deal that we have, and it's one that we object to.

And with that, Your Honor, if I could ask the Court to turn to the second page of the presentation that I've handed up. And I want to start with what I think is the fundamental defect in this bid, and it relates to the allocation point. Now, as Your Honor observed already, the testimony is unanimous from all of the witnesses that there was no allocation. Now, Mr. Carr in his cross-examination made clear why that's an issue. Because he could not

explain how the credit bid was being allocated as --

THE COURT: Well, let's just go to my question.

MR. QURESHI: Sure.

THE COURT: Is there a value here in the unencumbered assets on a reasonable basis in excess of either $3.9 billion or $3.5 billion depending on how you count the rollover of the DIP, the junior DIP?

MR. QURESHI: I think there is, Your Honor. If Your Honor turns to slide three -- and what I'll try to do here is walk through the numbers. But before I do that, Your Honor, we don't accept that the right way to do this is to simply globally take 5.2, deduct 1.3, get 3.9 and it's that simple. The DIP order requires that the ABL only be satisfied by the ABL collateral. This is not an estate that's been substantively consolidated, and so I don't think it's necessarily appropriate to look at it globally on that basis.

But, Your Honor, let me if I could walk through a few of the numbers. So on --

THE COURT: I'm sorry, the ABL is -- I didn't follow that point. I mean, what is happening with the ABL under this deal?

MR. QURESHI: So it's being repaid.

THE COURT: In cash. Not a credit bid.

MR. QURESHI: Correct.

THE COURT: All right. So let's move on from that point.

MR. QURESHI: Okay. So, Your Honor, if Your Honor looks at this chart. And this is a chart that appeared in a slightly different form in our objection. There have been some changes to it based on the testimony and the evidence that has come in. If Your Honor looks at the consideration paid column here. And what I'd like to focus on first of all is the assumed administrative claims. So the 503(b)(9) numbers, the severance and warrant, all those numbers that add --

THE COURT: This is page what?

MR. QURESHI: Page 3 of the presentation.

THE COURT: Page 3, thank you.

MR. QURESHI: And there's a chart there. And I'm beginning --

THE COURT: I just want to make sure I'm on the right page.

MR. QURESHI: Sure. It's beginning on the right side, the consideration paid side of this page. And what's set forth here is a number of the assumed liabilities. And on the top, the junior DIP we have at $175 million, gift card liabilities at $13 million. A total of 789. Now, if Your Honor looks a little further down, we've included two additional items that we don't think are appropriately in

the consideration paid column, and I'll explain why. But even if Your Honor disagrees with that, we think there's still a shortfall of consideration for the unencumbered assets. Those two items that we disagree with are the PA liabilities, the protection agreement liabilities at $465 million, and the additional junior DIP at $175 million.

And just briefly on those two, Your Honor. The assumption of the junior DIP, why we in our analysis think that it's only fair to look at half of that as being an assumption, that's because -- and this is detailed on the next slide. But, Your Honor, the company's own numbers show that the second draw of $175 million, the only purpose that served was to get these estates from the auction to the closing date essentially. But again --

THE COURT: So you're saying that that's a 506(c) claim instead?

MR. QURESHI: Well, Your Honor --

THE COURT: Not reciting Flagstar? Come on, let's be realistic here. So I'm going to create law now that every DIP loan is subject to 506(c)? Give me a break.

MR. QURESHI: So, Your Honor --

THE COURT: And I want to -- now let's go to the PA liabilities. You ever liquidated insurance company? So how are those claims treated?

MR. QURESHI: The reason that we suggest that the

PA liabilities are not appropriate here is because in the wind down scenario there were expressions of interest for the Sears Home Services business. And those expressions of interest included --

THE COURT: All right, well, get to that point. All right.

MR. QURESHI: -- assumption of the liabilities.

THE COURT: Okay, fine.

MR. QURESHI: So, Your Honor, let's not take those items out. So consideration paid --

THE COURT: Well, no. You're treating them at 465 instead of a billion.

MR. QURESHI: That is correct, Your Honor. And the reason we do that is, again, because of the record evidence and the testimony as cited on Page 5 --

THE COURT: That's what they're booked at. But as a claim, it's a billion dollars. I go back to -- have you ever liquidated an insurance company?

MR. QURESHI: No, Your Honor.

THE COURT: All right.

MR. QURESHI: And then over on the asset purchased side, Your Honor, I want to focus in particular -- so there's a low and a high. And the differences are driven, number one, by the real estate valuation. And I'll get to that talking only about the low-end numbers. And beyond

that, Your Honor, it's what we believe to be equity value in Sparrow, in the Sparrow assets and equity value in the assets securing the IGPL loan, which is set forth at the bottom of the page. And if you total those two up and you add it to the other assets that are being purchased, that, Your Honor, is where we think we get to the shortfall.

And if I can ask the Court to turn first -- next to Slide 6. And what I want to talk about very briefly is the real estate value, to make sure that the Court is clear as to in our low-end number what constitutes the difference. So there are 555 properties in the Debtor's unencumbered real estate valuation that the Debtors did not value. What Mr. Greenspan did with those properties is he said, well, let's take a look at them and see if there's any basis to value them. Eighty percent of them he agreed, he gave a zero. The balance he valued at $126 million.

Now, two important things with respect to Mr. Greenspan's valuation. One, he did the valuation on a dark basis. So there was no assumption that there would be an operating company that would keep these properties lit with all of the expenses associated with that.

Secondly, he deducted from his valuation an estimate of carrying costs for those dark properties to carry them through the lengthened sale process that his analysis was based on. The second bucket of properties

there's 402 at, his valuation, $800 million as against the debtors at 634. So that difference is made up of two things. One is, Your Honor, the Debtors took a 75 percent discount to liquidation value, Mr. Greenspan took a 60 percent discount to liquidation value for reasons explained in his report, which we think are well-founded.

So in addition on the Debtor's side of that analysis, Your Honor, what the Debtors did is their expert gave equal weight in that analysis to non-binding indications of interest, including those that came in at zero or, as your honor asked Mr. Meghji, did that apply equally to a $500 expression of interest. And the answer is that it did. So we do think --

THE COURT: Right. Do you dispute that he said the delta there if you didn't include any of that was $70 million?

MR. QURESHI: I believe that's right, Your Honor.

THE COURT: Do you dispute Mr. Greenspan's testimony that the $70 million was just a rounding error, so he didn't even include it in his adjustment?

MR. QURESHI: I think mathematically the way he expressed his overall range for all of the properties, that's correct.

Now, Your Honor, if I could move on --

THE COURT: Do you dispute that he ascribed value

to leases where the secured interest in the lease exceeded the value of the lease?

MR. QURESHI: Your Honor, I don't know the answer to that question. I'll try to get that.

THE COURT: Okay.

MR. QURESHI: Your Honor, if I could ask the Court to then turn to Slide 8. And this gets to the collateral that secures the Dove and the Sparrow properties. And Your Honor will recall that I took Mr. Kamlani through this document. There is an appraised value and a schedule prepared by Mr. Kamlani of those properties of $1.65 billion. The term sheet which is also in evidence quite clearly identifies the Dove and the Sparrow collateral as the collateral that secures that loan.

If Your Honor turns to the next page, we know from the asset purchase agreement that $544 million of the Dove debt is part of the credit bid here. Mr. Kamlani acknowledged that with that credit bid what ESL was acquiring was the collateral that secured that. So by simple math of subtracting that 544 from the overall 165, the remainder of that value is attributable to the Sparrow properties, as acknowledged by Mr. Kamlani. The Sparrow properties have some debt on them that's not in credit bid. So you back out that debt and, Your Honor, you're left with $560 million of equity value in Sparrow. And there's no

evidence as to how that's being paid for other than by credit bid.

Your Honor, similarly, the IPGL loan. If Your Honor turns to Slide 10. Now, the IGPL loan is being credit bid, as set forth in the asset purchase agreement, in the amount of $231 million. Now, the value of the collateral pledged under that loan exceeds that debt. The Debtors -- there's two components to that debt, Your Honor. One is the IP, and the second is the leases. So looking first at the intellectual property. We've excerpted on the page, Your Honor, of the wind down recovery from the Debtors that shows that the IP in the IGPL loan was valued by Ocean Tomo at $345 million. And with respect to the ground leases that are part of that loan, those were valued by the Debtors at $119 million. That's also excerpted. And that, by the way, represents a 50 percent discount to the appraised value. So those are conservative values.

And Mr. Kamlani, in response to questioning not by me, Your Honor, but by Mr. Bromley, confirmed that at the time of that loan, the collateral value exceeded the amount being lent, and he confirmed, as he did with respect to Sparrow, same questions, that he's not aware of any change in those values as of the time that he testified.

Your Honor, one more difference from between the committee's numbers and the Debtor's numbers with respect to

the unencumbered value. And that relates to unencumbered collateral where we had, Your Honor, back on Slide 3 for the other unencumbered accounts receivable a value of $60 to $80 million. We now have record testimony from Mr. Kamlani that the value of that is significantly higher, $255 million according to Mr. Kamlani.

So, Your Honor, the bottom line here is we don't think that there is value being received by these estates for all of the unencumbered assets, and we don't think there's evidence in the he record that supports that there is. And on that basis, we don't think that the credit bid can be approved.

Okay, Your Honor, if I could move on to the accounts payable issue. And this is addressed on Slide 12. If I understand correctly what I've heard from both the Debtors and from ESL, we don't have a deal. We don't have a deal because there is a disagreement over what the Debtors consider to be, and we agree, a very material term. And, Your Honor, in an estate that is indisputably being left administratively insolvent today if this transaction closes tomorrow, this estate is simply not in a position to close this transaction and then immediately litigate with Mr. Lampert.

And so we do think that this is an issue to the extent Your Honor is otherwise prepared to approve this

transaction that needs to be resolved and resolved in the Debtor's favor before there is a closing. It just makes no sense to close the transaction and begin to litigate.

I also think, Your Honor --

THE COURT: That's exactly what the Second Circuit says I'm supposed to do.

MR. QURESHI: Well, we think, Your Honor, that certainly in a context here where the estate is administratively insolvent, the company's evidence, not the committee's argument, $42 million was the amount of the insolvency. And if, as I understand the bid and the ask in terms of what ESL is prepared to pay, the amount of administrative insolvency goes up another $43 million. So while I don't disagree that in other circumstances it might be appropriate to close the transaction and allow that litigation to happen here, respectfully, Your Honor, I don't think that the Debtors in the exercise of their sound business judgement can or should do that. Not when there is an alternative in the form of what we have called the alternative sale transaction, the liquidation option, which we think yields a better result to begin with, and not when the estate is simply not going to have the resources to litigate.

In addition, Your Honor, I think that when one adds what's happening in court today on this provision to

all of the other conduct of ESL and of Mr. Lampert that is part of the record, it rises to the level of whether this is a good faith offer under 363 --

THE COURT: What other conduct is part of the record other than litigation claims that you and the special committee have asserted?

MR. QURESHI: Your Honor, I'm about to get to it.

THE COURT: Okay.

MR. QURESHI: So for all of those reasons, Your Honor, we don't think it's appropriate in these circumstances with an administratively insolvent estate to close on a dispute like this.

And unless I misheard the Debtors, I don't believe the Debtors are prepared to close so long as this is an open issue, either. That's how thin the line is in this case between whether this transaction makes economic sense or does not.

Now, Your Honor, I think there are a number of other issues that remain unresolved. And I will add that we received overnight more than 600 pages of deal documents. Revised sale order, revised asset purchase agreement, a transition services agreement, new releases. Your Honor, we're simply not in a position, despite literally having the entire team up all night, to respond in a detailed way to very dense documents that have very material terms in them.

And yet despite that flood of overnight documents, as I understand it, there are still material things that, frankly, I'm not sure are resolved. 503(b)(9) claims for example.

THE COURT: Have you read the order?

MR. QURESHI: I'm sorry?

THE COURT: Have you read the order or has anyone on your team read the order with the blackline?

MR. QURESHI: Yes, Your Honor.

THE COURT: Okay.

MR. QURESHI: And we are --

THE COURT: And you heard the representations about the transition services agreement.

MR. QURESHI: Right. And, Your Honor, we are concerned about the mechanics that are going to be in place to deal post-closing with 503(b)(9) to ensure that to the extent there's risk there, that is risk that is borne by ESL and as the buyer --

THE COURT: How concerned? Did you raise the issue ever until I raised it yesterday in light of your cross-examination to kill the deal?

MR. QURESHI: Your Honor, we have had numerous conversations with the Debtors.

THE COURT: No, no. Did you propose a specific change?

MR. QURESHI: Not prior to last night, Your Honor.

THE COURT: Okay. Why don't you propose one now so I can hear it?

MR. QURESHI: Again, Your Honor, not having had the time to go through --

THE COURT: No, no. You haven't thought about it. It was not to cross-examine someone about it, to raise the issue in my mind. So I raised it immediately. But you're so concerned about these people that you haven't made one proposal.

MR. QURESHI: Your Honor --

THE COURT: Maybe the two vendors on your committee might think about that.

MR. QURESHI: Your Honor --

THE COURT: I wasn't going to speculate, but I do now have a record on one big issue as far as your committee's operation.

MR. QURESHI: Your Honor, we --

THE COURT: So make the proposal that you say should fix it.

MR. QURESHI: We have made clear, Your Honor, that the 503(b)(9) provisions, the reconciliation of those claims needs to happen in a way so that the debtor is able to reconcile those liabilities without bearing the risk, that the risk of that should be borne by ESL.

THE COURT: But ESL is picking it up. it's just the Debtor is liquidating it and it's within the budget that's part of the calculation of the going forward costs, unless you dispute that.

MR. QURESHI: Your Honor, it's not that we dispute it, it's that we haven't been shown the details.

THE COURT: It's a claim objection process.

MR. QURESHI: Your Honor, also with respect to the Cyrus release, we just don't understand why a Cyrus release should be approved. First of all, Cyrus does not need release in order to credit bid. Cyrus' consent to a credit bid isn't even required. ESL can and has directed the indenture trustee to credit bid those claims. And secondly, our understanding and the reason, I think, that the asset purchase agreement as it was originally filed did not have a release for Cyrus is that ESL had obtained the financing commitments to satisfy the junior DIP, and they did that without the need for any release from Cyrus. And so the auction record was clear on that point. And then all of the sudden Cyrus shows up and says we want to release and, by the way, we're not prepared to pay for it.

THE COURT: Well, they roll over the DIP.

MR. QURESHI: Well, but again, Your Honor, the estate isn't getting anything in return for that. The estate had --

THE COURT: I'm sorry, the DIP is rolled over. It's not paid for in cash.

MR. QURESHI: Your Honor --

THE COURT: How much is that junior DIP?

MR. QURESHI: $300 million.

THE COURT: All right. And what would happen if it wasn't rolled over, to your administrative claims analysis, your professed concern about administrative insolvency?

MR. QURESHI: The concern is not professed, Your Honor.

THE COURT: Well, what would happen to that amount?

MR. QURESHI: ESL --

THE COURT: What would happen to that amount? Would it get paid or not? Would it have to get paid as a priority administrative expense?

MR. QURESHI: My understanding, Your Honor, is it would have been paid by the financing commitments that --

THE COURT: No, no, not would have.

MR. QURESHI: -- ESL had in place.

THE COURT: Today, today. The Second Circuit in FNN says that the bankruptcy court has a difficult balancing act in dealing with these decisions in real time. So today what would happen to that $335 million if you go into a wind

down?

MR. QURESHI: Today it would be an administrative claim, of course.

THE COURT: All right. And instead it's being rolled over. And you don't think there's any value to the debtor in that?

MR. QURESHI: Your Honor, we are looking at it from the perspective of if the transaction closes.

THE COURT: But in past tense. Because that's what litigators do; they like to litigate things that happen in the past. But that's not what bankruptcy lawyers and bankruptcy judges do. They have to look at transactions that are supposed to happen in the he future.

MR. QURESHI: And when the ESL bid was selected as the highest bid at the auction, ESL had committed financing in place to satisfy the junior DIP. And they had that financing in place without the need for a release from Cyrus.

THE COURT: And now they don't.

MR. QURESHI: And now they don'[t.

THE COURT: Right.

MR. QURESHI: They changed the deal --

THE COURT: So we should just pull the plug.

MR. QURESHI: No, we shouldn't pull the plug. We should say to Cyrus, go forward, but without a release. Or

we should --

THE COURT: Well, I said that last night. I don't know if you did or your partner did. I did. And they carved out what seemed to be the real concern, which is something beyond the release that ESL was getting. So let's move on.

MR. QURESHI: Very well.

THE COURT: Basically so far I'm finding all of this highly pretextual.

MR. QURESHI: I will nonetheless continue to make the record, if I may, Your Honor.

THE COURT: Yes. I know it's hard for you, but you should go ahead and do that.

MR. QURESHI: Your Honor, the transition services agreement, again, one of the documents that we received overnight. And, Your Honor, these are not documents about which we are consulted before we get them. These are not documents about which our input is sought before we receive them.

THE COURT: Let me tell you how I look at the transition services agreement.

MR. QURESHI: Sure.

THE COURT: I agree with you completely on that point. All right? But I have a record here, which is that this agreement is more than neutral for the Debtor, that the

Debtor actually does better under this agreement than if they were just compensating each other for the fair value of the services. And if that's not true, that's not what I approved. That's what I'm approving; what I just said and what the record says.

MR. QURESHI: Your Honor, I didn't think there was any evidence about the TSA.

THE COURT: There were representations by both sides as to what it contains and its bottom line.

MR. QURESHI: Your Honor, let me move on to another area that I have no doubt the Court will disagree with.

THE COURT: Okay.

MR. QURESHI: But I will, again, make the argument, nonetheless.

We do think that ESL in a number of ways acted inappropriately in the auction process and acted in a way that we think influenced the outcome. And let me go through a handful of the ways in which we think that happened.

First of all, we introduced into evidence an email from Mr. Transier which we found somewhat odd, that an independent director put in place in a role designed to investigate Mr. Lampert would at the very outset of that process send him an email with the subject line, Very Impressed, followed by a request from Mr. Lampert that they

meet in person.

And then we get into the auction process itself when these independent directors, Mr. Transier and Mr. Carr, are supposed to be assessing ESL's bids. And what happens? Threats from Mr. Lampert. You're going to get sued immediately, you should be removed from your role as an independent director, you should be bypassed completely because you didn't approve my bid.

THE COURT: The threat that you're referring to is the letter, right?

MR. QURESHI: Yes. It's on Slide 21.

THE COURT: Were you a party to the chambers conference that we all had on that that was called immediately after that letter was delivered?

MR. QURESHI: I was, Your Honor.

THE COURT: So since I ran it, I will for the sake of the record state that I said that letter should be put in a drawer and forgotten about because it had no effect and was half-baked because, among other things, it did not deal with the fact that ESL's bids had at that point insisted upon a complete release. And there's no doubt in my mind that everyone in that conference understood that that letter was a dead letter. And I believe the record reflects in terms of negotiations thereafter that understanding. And if anyone believed to the contrary, including you and your

partners, you could have come to me and said no, they're still leaning on it. And I didn't get that. And you know that I would have reacted immediately if I had been apprised of that.

MR. QURESHI: And neither I nor my partners had a different understanding, Your Honor. But that is not what's relevant here. What's relevant here is did it have an impact on the decisionmakers? And for that, Your Honor, look at the next slide, Slide 22. We have minutes where Mr. Schrock explains that it was describing what the advisors and the management have been doing to get to a deal. It was hard to do amidst threats of court action from the primary counterpart where Mr. Schrock describes in the auction transcript a situation that was very difficult for his subcommittee where an insider and a chairman is threatening litigation with the very party whose bid they are supposed to be evaluating.

So from that perspective, Your Honor, while we certainly as counsel to the committee viewed the threats to be empty, that's not what's relevant. What's relevant is the decisionmakers and how did the decisionmakers view it. And that is why we referred to it here.

Next, Your Honor, the letter from the office of the CEO. And this one, Your Honor, is the one that I find most troubling.

So, subsequent to Mr. Lampert's resignation as the CEO, the office of the CEO was created that consists of the three people whose names are here on Slide 23. Now, Your Honor, this is the senior management team of the company whose job it is to provide guidance and make recommendations to the board of directors on numerous important operational issues, and most of all during this timeframe the ESL bid. And yet the very people that are supposed to be doing that were requested by Mr. Lampert to write a letter to the board. They then apparently wrote that letter, sent a draft of it to Mr. Lampert's counsel. And then that letter was sent to the board. And the letter says, Mr. Lampert, we support you and we support your bid. And that's the management team that the board is supposed to take advice from, all engineered by Mr. Lampert.

So do we think that had an impact on the decision-making process? Yes, we do. Do we think that was inappropriate conduct by Mr. Lampert? Yes, we do.

Now, Your Honor, moving on to the release. And I am not going to get into the merits of the claims. It was never our intention to do that. I will state simply that we incorporated by reference into our pleading our standing motion in the complaint that was attached thereto. We think the claims are very well-founded. We think that that complaint in every respect easily passes a motion to

dismiss. We think the claims are more than colored.

Why do we think the release and the consideration for the release are woefully insufficient here? Two principal reasons, Your Honor. Number one, the claim allowance that was allowed here to allow ESL to credit bid, it's more than was needed to allow them to credit bid. We think that if the claims allowance was limited to the $1.3 billion that is credit bid and the balance of the claims were subject to recharacterization and equitable subordination, that would have been a more appropriate balance.

Secondly, Your Honor, in light of all of all of ESL's claims being allowed, what is fundamentally problematic from our perspective with the release, the credit bid, and the consideration for those two things, is that with the 502(d) remedy given up, the estate is now in the position of having to look to ESL and to Mr. Lampert to recover on what the restructuring subcommittee agrees are very valuable claims. There is no record evidence at all that the subcommittee conducted any diligence to inquire into is it going to be easy or difficult to recover against ESL. Where are ESL's assets? Are they offshore, are they in trusts? How are Mr. Lampert's assets held? Those are all potentially significant collection issues that the estate is now being put at risk of because the 502(d) remedy

has been given up and has been given up to a greater degree than necessary to allow the credit bid. And that's problematic, particularly on a record where no such diligence was performed.

In addition to that, we know from the testimony of Mr. Kamlani that a very substantial portion of the value of ESL is tied up in Sears. And another significant chunk of the value of ESL is tied up in Seritage. Seritage will be a defendant for a very substantial claim. And we know that a substantial amount of the value of ESL is Mr. Lampert's personal capital, all tied up in Sears and in Seritage.

Your Honor is aware from the evidence we've presented --

THE COURT: No, I thought the personal capital was separate from Sears and Seritage.

MR. QURESHI: Well, I think the evidence is that of the assets undermanagement by ESL, some very substantial portion of that, I think maybe 70 percent, is Mr. Lampert's personal money.

THE COURT: Right.

MR. QURESHI: So, Your Honor, there is --

THE COURT: I understand the remedies point. In terms of the showing that you would have to make, it's basically the same. It's very close. I mean, there's some more discretion that a judge would have under equitable

subordination, but it's actually quite close, particularly given the other -- the language we went through early on in the release. But as far as the remedies issue is concerned, the valuations, either on a liquidation basis or -- I mean, committee's valuations on a wind down basis or the valuations of the deal show that there is substantial value not subject to liens in the purchased assets. And frankly even 30 percent of the remaining 30 percent of ESL would seem to me to be still a very large amount of money when you're talking here.

So I understand the issue, that you have to go and collect. But given that it's a public company and given that they're certainly on notice of these claims and that any transfers of assets out after that notice would be per se a fraudulent transfer, under New York law at least, to me, I just -- I'm not sure why it is such a big deal to equate a release for credit bidding and claim allowance purposes as a general release in essence.

MR. QURESHI: Your Honor, I think it all comes down to the collection risk on the estate and whether it makes sense to take that collection risk when a much more certain remedy is at hand in the form of 502(d) and when that could have been achieved while still allowing a credit bid.

THE COURT: Well, except at that point you're

collecting from the proceeds of a liquidation of the real estate assets and GOB sales over a relatively short time and fighting with ESL and Cyrus over 507(b), which is a superpriority, and 503(c). So, you know, it's not like you could snap your fingers and bring in the money.

MR. QURESHI: Your Honor, let me move on to --

THE COURT: I mean, no, I'm not -- that's not a rhetorical statement. Am I missing something on that? Because that's how I've been looking at it.

MR. QURESHI: No, look, Your Honor, I think that when we assess the reasonableness of the deal that was struck and we weigh the value of the claims on the one hand with the consideration that was received on the other hand -- and there was testimony from Mr. Basta about what that consideration was. It doesn't line up at all with what the witness said, but that's a different story.

THE COURT: But again, it's consideration for a limited release on remedies.

MR. QURESHI: Yes.

THE COURT: And, you know, 35 million in cash plus a cap on recoveries from certain -- which are effectively going to be their only remaining assets -- in return for a limitation on remedies as opposed to bring claims and to go after what at least appear to me to be substantial assets, seems to me to be a pretty fair deal.

MR. QURESHI: Your Honor, the other concern that we have, and it continues to relate to collection risk, is very strong doubts about what's going to happen with new Sears after this transaction should close. And in particular, Your Honor, I'm referring to $930 million of budgeted-for asset sales in three years. That is a very substantial chunk of the value here that's going to get sold. And where those proceeds are going to go, we obviously don't know. Whether those assets are going to, as they have been in the past, get spun off to some other entity that ESL and Mr. Lampert has an interest in, whether that pattern is going to continue, we don't know. What we do know is there is a plan in place for very material ongoing selling of assets. And that's a point I'm going to come back to when I talk about jobs.

THE COURT: Right. That's fair. On the other hand, I would hope you would be able to progress your litigation faster than three years. I know you would

MR. QURESHI: We certainly intend to try to progress as fast as possible, but we also know, Your Honor, because it happened last week, we got a liquidity forecast that said $200 million of real estate sales in 2019, and then it was changed. Now it's 250.

THE COURT: I understand. I understand.

MR. QURESHI: So how fast that's going to change,

particularly once ESL's decisions in that respect are no longer subject to bankruptcy court review, we shall see.

Your Honor, if I could turn to Slide 27. And I want to talk briefly about from the committee's perspective why we view the alternative to a sale to ESL to be superior. And I will come back to the employee point, Your Honor, after I walk through the numbers.

So on this chart, Your Honor, what shows first of all is the administrative insolvency. But I also want to make that point here -- and it was a point made by Mr. Meghji. Who is the principal beneficiary of the going concern transaction? And again, I'm going to come back to the employees and the vendors and all the like. The principal beneficiary of the going concern transaction is ESL.

THE COURT: I guess that has some appeal to people that don't understand bankruptcy law. But anyone who has read the RadLax decision in 363(k) knows how much is left unstated in that statement. Right? I mean, the reason they are the principal beneficiary is because they're being allowed to credit bid. And we just talked about I think a pretty nuanced evaluation of that settlement which preserved claims against them. So, you know, it's true they are the beneficiary in the sense that they're being allowed to exercise a right that the supreme court said they have

unless the bankruptcy court says they don't for cause. And that's what the settlement is about.

MR. QURESHI: Part and parcel, Your Honor, of what we think is going to happen post-close and whether post-close this enterprise is likely to survive as a going concern and whether as a result of that all of the creditors that would benefit are in fact ever going to realize that benefit and whether in fact all of those creditors might actually be better off if we look at an alternative scenario.

THE COURT: Okay, that's a separate point, but that -- go ahead.

MR. QURESHI: And so on the alternative scenario, Your Honor, if Your Honor turns to Slide 28. And what Slide 28 is is an excerpt from Mr. Burian's declaration. And I just want to highlight to Your Honor how few things need to move in order to demonstrate that creditor recoveries are actually better in the alternative scenario.

So for unsecured creditors, first of all, there is an issue, and it's described in Mr. Burian's declaration in some detail, but around the allocation of administrative claims and the extent to which those administrative claims burden unencumbered assets versus the ABL collateral. We don't think that the way the debtors have proposed in their analysis of the wind down scenario to burden the unsecured

claims is appropriate. And what is --

THE COURT: Is that a 506(c) point?

MR. QURESHI: Yes. And --

THE COURT: Okay. So how are you going to get around the Second Circuit on that point, and the other circuits, including Domistyle, that you would have to show primary and direct benefit.

MR. QURESHI: Well, Your Honor, we think that when the ABL collateral --

THE COURT: Including when you have a 506(c) waiver in the DIP agreement.

MR. QURESHI: But there is no waiver for the second lien, Your Honor.

THE COURT: I'm talking about the first one. So you're not really talking about the ABL; you're talking about the second lien.

MR. QURESHI: I'm sorry, that is correct. The number here that has moved, that is boxed in Mr. Burian's analysis, it's the second lien.

THE COURT: Okay. And so then you would have to establish, notwithstanding Flagstar and Domistyle and all the other cases dealing with 506(c), that this is as simple a case as selling a piece of real estate for the entity that has the mortgage on the property.

MR. QURESHI: Your Honor, I have no doubt there

would be litigation around the issue, but we do think there is an argument that a reallocation is appropriate.

THE COURT: I understand the argument. I also went through that experience with a very inexperienced secured lender group in a case last year where they didn't agree to carveouts and the like or to fund the case, even though they wanted the case funded. It was -- you may well be better lawyers, and their lawyers -- although the lawyers were pretty good for the Debtor's side, it's not an easy case to win. And it was settled with major haircuts to the professionals and the administrative expense creditors because the standard is a high one to make. Second Circuit has set a high standard, and that's been followed by the other courts.

MR. QURESHI: You know, the other significant driver is --

THE COURT: I didn't seen any briefing of that issue, by the way. It's just assumed by Mr. Burian, who I know he's a lawyer, but he hasn't been a lawyer for a long time.

MR. QURESHI: Your Honor, the other issue, and we do address it in our brief, is that second lien 507(b) claim. Mr. Bromley mentioned it briefly as well, so I won't spend any more time there.

THE COURT: Right. You're giving no value to that

though, right?

MR. QURESHI: In this analysis, we are not.

THE COURT: No, okay.

MR. QURESHI: Your Honor, if I could then move on --

THE COURT: Is that because the value of the collateral declined or didn't -- I mean, didn't decline during the case? Is there evidence in the record to show that the value of the collateral didn't decline?

MR. QURESHI: Your Honor, again, that's --

THE COURT: I don't think there's evidence that shows it did decline, but to say that it didn't is kind of a stretch here given the amounts that at least the Debtors have said that they've been operating at a deficit at times.

MR. QURESHI: Your Honor, if I could turn to very briefly the business plan. And this starts on Slide 30. And, you know, our point with the business plan is simply this; that history has to be a guide here, and it has to be a guide in circumstances where you have the same management team in place that put together the ESL business plan. That what evidence shows. Obviously the same ownership structure in terms of Mr. Lampert being at the helm of the go forward business. And when Your Honor looks at the historical results -- I mean, frankly, Your Honor, I've never seen anything like it. Magnitudes of misses so huge. And yet

year after year those misses having no impact on the projections for the next year, as though history didn't occur. And when we look at the go forward plan -- and Yes, Mr. Kniffen did not testify here, and it's curious that Mr. Bromley expresses so much confidence in his ability to have him excluded by way of a Daubert Challenge and yet nobody wanted to cross-examine him. Your Honor --

THE COURT: I did read the deposition. I mean, it's true, there's no challenge. I guess he's been accepted as an expert, right?

MR. QURESHI: He has.

THE COURT: So -- but he also is clear that he's never written anything on this issue, there's no peer review on his analysis or the methodology of his analysis. So I took it for what it's worth. An I understand your point about his projections. The Debtors are asking me to accept the projections basically -- for basically 2018. And I mean, the performance in -- the real performance in 2018 to counteract all of the years of misprojections. And I understand that point.

MR. QURESHI: And, Your Honor, what Mr. Kniffen does have is 30 years of experience as a senior executive in the retail industry.

THE COURT: Yeah. Although he also says retail has changed a lot since his last time that he actually

worked for a retail company, which was I think 2005, right?

MR. QURESHI: 2005 I believe since he left he May Department Stores, that's right, which is where he was.

THE COURT: I mean, I was trying to think --

MR. QURESHI: But he has obviously remained in the business since then.

THE COURT: I was trying to think back what sort of computer I had in 2005. It's -- you know, it's a totally different world today.

MR. QURESHI: And it's a world he's still involved in, Your Honor --

THE COURT: Sort of.

MR. QURESHI: -- on a day to day basis as a consultant. Well, Your Honor says sort of. I think his deposition is clear; he's a full-time consultant in the retail industry.

THE COURT: I know. He walks through malls. I understand. I read his deposition. I just -- I didn't -- look, this is an inexact exercise to begin with. And frankly, there was, you know, one element of his exercise that just was flat-out wrong I think. You should respond to that, which is the occupancy point.

MR. QURESHI: Your Honor, on the occupancy point he is, as I understand it, pulling numbers from the Debtor's filings. And I don't think that has a material impact on

his observations. I think the key observations that he makes, Your Honor, are that -- if you look at the excerpt from his report that we have on Page 30, the type of growth that is projected at the same time that SG&A is going to get slashed by $600 million a year, something this company has been trying successfully to do for years, that EBIDA growth is going to continue, that margin growth is going to continue. It's something that he says. It's just unprecedented to see that kind of a turnaround. And when you peel the onion back, the next layer, Your Honor, and you look at the business plan and you ask yourself, well, what's driving it? Well, the key is apparently Shop Your Way. That's what we heard from Mr. Kamlani. He went on at length in his deposition about it. Mr. Lampert went on even longer in his interview about it. And yet the initiatives that are going to be the source of all this revenue are the same initiatives that are in the business plans from years past. Nothing's changed.

And in addition to that, Your Honor, we have some contradictory testimony in that Mr. Kamlani says, well, the ecosystem, is how he referred to it, is important. And the bigger the ecosystem, the better for Shop Your Way. And Mr. Riecker says a smaller footprint is better because we're getting rid of all of these EBIDA-negative stores and we can shrink our SG&A.

THE COURT: How are the parties -- I want to make sure I understand the defined term ecosystem. I understood it to mean the fact that Sears has warranties, service people, you know, that sort of stuff, the Innovel, the -- that's how I interpreted it. And I don't know, is that how the parties are -- is that how he's using it in your --

MR. QURESHI: I believe that that is how Mr. Kamlani is using it. And when he uses it --

THE COURT: So those aren't going away.

MR. QURESHI: No. But when he uses it in the context of Shop Your Way, I believe -- and there's a long back and forth between Mr. Kamlani and I in his deposition about this -- that what he is also talking about is that the value of Shop Your Way is dependent on attracting partners, outside partners.

THE COURT: I understand that.

MR. QURESHI: And that's easier to do when you have a bigger footprint.

THE COURT: Or -- yeah. Or maybe more profitable stores where people like to shop more.

MR. QURESHI: Well, all I can --

THE COURT: No, no, no. I agree with you. I mean, unfortunately in today's world, whether it's a company that used to print textbooks or a company that sells plus-size clothes, the internet's changed everything. And,

frankly, any projection is more in doubt than, you know, a normal projection that you would have had 15 years ago or ten years ago. Because of that, it's very hard to predict. I agree with all of that, definitely.

MR. QURESHI: Yeah. And in an industry when it's very hard to predict, hockey-stick-like projections, which is what these look like, are even more unreasonable than in an industry where that's not the case. Where the history of the company is wild misses year after year and it's the same company going forward with the same management team --

THE COURT: Well, see, that's the part I'm not so sure about, the same company going forward. I understand the management team. It does seem to me that they had a huge drag with the size of the company and the debt load. And, you know, whether that's enough or not --

MR. QURESHI: So, Your Honor, let me go on as I said I would to address the issue of jobs. And the first thing I'm going to do is defend the committee and defend the committee's advisors. Because, Your Honor, it's just not the case that we have ignored the interests of employees, that we don't care about the interests of employees, that Mr. Burian doesn't care about the interests of employees, or that that wasn't something that was considered in connection with all of the analyses that we did. This committee and every member on it owe fiduciary duties, and those duties

have been taken very seriously, everybody has acted faithful to those duties. And, Your Honor, the bottom line is there are situations in bankruptcy where liquidation can be the better option. It's never pleasant. It's not something anybody involved in a bankruptcy case wishes for, but sometimes it's the better result. And here we believe that it is the better result for all of the reasons we've been talking about.

But what I want to make clear is that this has been presented, Your Honor, as a decision between 45,000 jobs on the one hand and zero on the other. And that's also not right. Because in the alternative scenario, there are standalone pieces of this business, like Sears Home Services, like Innovel, like Parts Direct, that in the aggregate employ over 10,000 people. And those are jobs that would be preserved.

THE COURT: What sort of bids were made on those during the sale process?

MR. QURESHI: So, Your Honor, it's detailed in Mr. Burian's report. And if Your Honor goes back to Slide 3 of the deck, the values that are on the asset purchase side there for Sears Home Services and the repair business and ship business, that reflects indications of interest or bids that were put in as part of the sale process. Because of how that process went, Your Honor, those never were

progressed to definitive bids. But those as all, as I understand it, indications of interest where the intent was that the business would continue to be run.

THE COURT: And would those indications of interest assume that Sears would continue?

MR. QURESHI: Your Honor, I don't think so. With respect to, I believe it was the Sears Home Services business, I think there was one bid that originally did contemplate and had some contingency in it about Sears stores, and then there was a revision of that or at least discussions concerning that where that was then no longer the case, at least with respect to one of those parties. So it's not a case of 45,000 versus zero.

And the other thing that I think is significant, Your Honor, and it's part of the record. Look at Slide 31. Slide 31 is the history of jobs --

THE COURT: No doubt it's gone down. There's no doubt about that.

MR. QURESHI: And more to the point, Your Honor, so it's the trajectory under Mr. Lampert's leadership. And it's not that I'm suggesting that the internet didn't happen. But with all of the substantial asset spinoffs that obviously have a very significant impact on employment.

And in addition, Your Honor, I'll come back to what we've excerpted on Slide 32, which is the asset sales.

Your Honor, when Mr. Burian talks about the process and the process failings here as far as the sale process and how rushed it was, let's be clear that Mr. Burian is not criticizing Lazard, the Debtor's investment bankers. It's really a criticism of Mr. Lampert. Lazard was brought in basically at the filing. There was no time to prepare a proper sale process. And frankly, we think it's because that's exactly how Mr. Lampert wanted it. He set up a process where there was no alternative but for ESL to be standing alone as the only party that could possibly put forward a going concern bid in the very limited time that was left. It was a chaotic filing at the most important time of year for a retailer. And looking at that from the outside, it made no sense. And that was preceded by a long period of time where in effect what Mr. Lampert --

THE COURT: Is there anything in the record indicate that any other going concern party said, for example, give me a little more time, I'm happy to make a bid, et cetera?

MR. QURESHI: Your Honor, there are a number of statements in Mr. Burian's declaration that go to conversations that he had with bidders where, as Your Honor just put it, those statements were not expressing --

THE COURT: I'm talking about a going concern bidder.

MR. QURESHI: For the entirety of the business, no, Your Honor.

THE COURT: So we're really talking about the segments.

MR. QURESHI: We're really talking about the segments. But again, this entire process was, in our review, set up to fail. Not Lazard's fault. They did the best they could in the very limited amount of time that they had.

THE COURT: Did anyone ask to extent the process in any way or raise those concerns? I don't remember hearing from Mr. Burian about those concerns, and you know how active I am when anyone does raise a concern. For example, when I got a call from one of the real estate council, I think I responded to the Debtors and him within five minutes of getting the email. Was that concern ever raised to me during the sale process?

MR. QURESHI: Your Honor, the concern was raised by this committee from day one --

THE COURT: No, no. To me.

MR. QURESHI: Which concern specifically, Your Honor?

THE COURT: Articulated to Mr. Burian's declaration about information not being available, people wanting to bid and not knowing -- their requests being

denied, et cetera, et cetera, et cetera.

MR. QURESHI: Your Honor, we raised those concerns with the Debtors. We did not file a motion, we did not seek relief from the Court.

THE COURT: Or even request a chambers conference to discuss it.

MR. QURESHI: We did not. Your Honor --

THE COURT: Might it be because you didn't want a going concern sale in the first place?

MR. QURESHI: Your Honor, we made it clear from the very early days of this case that we were very concerned by the administrative burden. Millions of dollars a day --

THE COURT: Right. So it would have to be a fast process anyway.

MR. QURESHI: Given the way it was set up by Mr. Lampert, it absolutely would have to be a fast process. And unfortunately, that's one of the reasons and one of the dynamics why we think in this circumstance the alternative would be better. It's just the reality of the situation, Your Honor.

Now, had -- and certainly in the claims that will be brought against Mr. Lampert and that will be brought against ESL these facts will come to light. And I'm not here to litigate those now. But we do think, and we think there's evidence to support that Mr. Lampert knew exactly

what he was doing when he elected not to commence a reorganization for Sears years earlier than he did. With advice from investment bankers he had retained at the time telling him of exactly the risk of what would happen if he didn't do it, which is what would happen here, telling him specifically that with retailers, there is a high risk of liquidation --

THE COURT: I'm sorry. I guess -- you know, I usually don't pay a whole lot of attention to the buyer when they stand up in support of a sale. But there was to me some cogency to Mr. Bromley's argument that if ESL really wanted to take the assets, it would actually cause a liquidation and that it could cherry-pick the assets it wanted.

MR. QURESHI: I think, Your Honor, that that for ESL is a far inferior result to being able to credit bid all of their claims. And by the way, Mr. Bromley --

THE COURT: Well, you could credit bid on just the assets you want.

MR. QURESHI: And Mr. Bromley also --

THE COURT: That you have liens on.

MR. QURESHI: I'm sorry?

THE COURT: That you have liens on.

MR. QURESHI: And Mr. Bromley also says that the claims against his client have no merit.

THE COURT: No, that's a separate -- I'm accepting that they have merit because I have two independent parties with well-staffed law firms telling me so. Now, that'll have to be sorted out in the future, but --

MR. QURESHI: And what we see, Your Honor, in the business plan, and in particular in the plans for asset sales under that business plan, is a continuation post-close of what happened pre-petition, which is a continuing selling of assets. And, Your Honor, Mr. Kamlani and ESL I think are very careful in saying, look, we're making offers of employment to these 45,000 people, there is no obligation to employ them for more than a day. He's clear that he doesn't know or at least hasn't yet decided exactly what's going to be sold and what the employee reductions are going to be as a result of that. But it doesn't take much, Your Honor, to figure out that at $930 million worth of asset sales, there's going to be a lot of lit stores in that number that end up getting sold, and likely a lot of job losses as a results.

So, Your Honor, to sum up, the very party that was accused by the restructuring committee -- and, Your Honor, on Slide 33 there's an excerpt from the auction transcript. And this is Mr. Basta speaking. He talks about ESL's abuse of its control and about the transfers of hundreds of millions of dollars of assets, and those transfers hurting

Sears and its employees. It's rather ironic that that very individual is now presented as a savior for all of these jobs.

Your Honor, I had shown Mr. Carr a series of text messages that he was exchanging with his advisors. And he was doing so right around the time the ESL bids were being considered. And the one in particular that I focused on, and the reason I focused on it is where Mr. Carr says, it's close enough. Respectfully, Your Honor, a proper analysis here where we have everything that we have going on -- an insider -- an insider who is not just a regular insider, he's the chairman and the CEO of the company. An insider against whom valuable claims have been alleged. When that same insider who has taken the steps that I've described in terms of his involvement in the auction process, when that's what's going on, and a bid by that insider is tabled, close enough doesn't cut it. Whatever the standard is -- and we've briefed the issue of whether it should be heightened scrutiny or business judgement. Under either standard, under any standard, close enough and we've got cover, shouldn't cover --

THE COURT: Show me the email. I'm not sure I understand the close enough. I think you're quoting that out of context, unless I'm missing something.

MR. QURESHI: It's the very -- second-to-last

page, Your Honor. It's Page 34. So this is the text message exchange on January the 8th.

THE COURT: Yeah, that's January 8th.

MR. QURESHI: Yes.

THE COURT: That's -- all right, I will tell you what that is. All right? That's when everyone came into my office and said we don't think we can go any farther. I heard the parties and made the assessment, no, you can go farther. And that's what he's referring to when he says close enough for government work. I think he's saying he's not so sure I'm right, but he did then testify that $800 million was added to the transaction thereafter and the release was limited, as we've already discussed and I think as you conceded was reasonable. So I think you've misquoted that.

MR. QURESHI: Well, Your Honor, the text right above it where Mr. Carr writes to Mr. Stogsdill and says, "This is good and gives us cover."

THE COURT: Yeah, January 8th. Exactly.

MR. QURESHI: Yeah.

THE COURT: Yeah, that's fine. Blame it on the judge. That's fine. That's what the judge does sometimes. Look, I appreciate -- I remember Eastern. Eastern, you know, the judge said this airline should survive. It didn't. And it didn't because the person who ran the

airline messed it up. All right? I understand those things. I've been around for a while. So -- but don't misquote someone about their decision based on something that happened seven days before the decision was made and after several rejections of interim offers.

MR. QURESHI: Your Honor, I'm certainly not blaming the judge, as the Court put it, by any stretch.

THE COURT: No, no, but that's not the point. I'm saying don't misquote Mr. Carr. It's totally out of context.

MR. QURESHI: I don't believe we are misquoting Mr. Carr.

THE COURT: Well, I do. I do. He's talking about a specific point when I say keep talking to each other, period. That's all he's talking about. And he was pretty much fed up with Mr. Lampert at that point. As people got fed up with Mr. Lorenzo, you know, 30 years ago. And I believed that -- and he certainly was within his rights, because the judge only sees about five percent of what's going on in a case. But I believed, based on the conference that I had with the parties, that there was a basis for a limited period with protection for the estate to keep talking. And that's what he's talking about, and that's the cover. So I don't fault him for the email, but I do fault you for misquoting it in the context. It's not the approval

of the overall deal; it's the approval of an interim step in the deal.

MR. QURESHI: Your Honor, I will end with this. I don't think there's a deal to be done today.

THE COURT: Okay. So I know there may be other -- I know there's at least one other party that wanted to speak, because she was on the phone. Are there other parties that want to address their objections? Just a moment. I'm sorry, my courtroom deputy tells me this -- this oral argument is going a lot longer than oral argument normally goes on front of me. And she tells me that we don't have this room beyond 1:00, that we have to go into my courtroom. So I think it may make sense, since it's only ten minutes to one and there are about 150 people in this room, that we should break now, set up the call again, and then hear the other objectors. Unless --

MR. LEHANE: I've got an update, but not an argument.

THE COURT: Okay. If someone has like a two-minute update that --

MR. LEHANE: I have a one minute --

THE COURT: All right, a one-minute update. That's fine.

MR. LEHANE: Thank you very much, Your Honor. For the record, Robert Lehane, Kelley, Drye, and Warren on

behalf of Brookfield Property, SITE Centers, and numerous other landlords.

Your Honor, as Mr. Schrock indicated on the first day of the case, we have been working a group of landlord council on behalf of a significant portion of the landlords to try to work and make sure that the form of order incorporated the concept that all landlord rights would be adjourned and preserved, that the designation rights process would fully do that. It's obviously been a moving process. I believe we're there and we've really been able to work closely with counsel for the Debtor and ESL throughout the four or five days now. There were some curveballs thrown at us, including the lien on leases and new financing package. I think we've resolved those consistent with your prior decisions in that. We're waiting to hear from counsel for the secured lenders on the exit facility to confirm that. but as far as that goes, Your Honor, I believe we're in a place where we believe all our rights have been reserved until the --

THE COURT: I did see the blackline of the order that I think did that. But I appreciate the confirmation of that.

MR. LEHANE: Thank you, Your Honor.

WOMAN 1: Your Honor?

THE COURT:

I'm serious, unless it's like 30 seconds. I really need to get the people out of this room because they're going to be having a jury assembly here or something for the district court. So I'm going to adjourn for about ten minutes, and we'll get you back on the phone, all of you who are on the phone, and resume at about five after one.

(Recess)

THE COURT: Okay. We're back on the record in In Re Sears Holdings Corporation. Just want to make sure I -- we have CourtCall on, correct? I mean, the Court -- the people on the phone? Let's put it that way.

WOMAN 1: Yes, Your Honor. We are connected.

THE COURT: Okay. All right. So when we left off, I was hearing or about to hear the remaining other objections or reservations or statements.

MR. ZUMBRO: May I proceed, Your Honor?

THE COURT: Yes.

MR. ZUMBRO: Good afternoon, Your Honor. Paul Zumbro from Cravath, Swaine & Moore on behalf of Stanley Black & Decker.

Your Honor, we have no objection to the sale itself. As Mr. Schrock just reminded me, we have a discrete issue in the overall context of this hearing, but it's important to my client.

Our objection is at Docket Number 2072, we have an

assumption and assignment objection and a cure objection. The cure objection is relatively straightforward. I will address that briefly at the end of my presentation.

The assumption and assignment objection, however, is a bit more complex. That objection concerns the proposal to assume and assign a valuable trademark license without our consent.

Now, by way of background, Your Honor, my client, Stanley Black & Decker, purchased the Craftsman brand and the related trademarks from Sears in early 2017 for approximately $900 million. In connection with that transaction, SBD licensed that to Sears, a license to allow Sears to use the Craftsman mark in the sale of Craftsman-branded tools and other Craftsman-branded products in Sears retail stores. That trademark license agreement was included in the list of initial assigned agreements that the Debtors recently filed in connection with the proposed sales.

Your Honor, as I mentioned, we have not consented to that assignment. And unlike a garden-variety contract where the bankruptcy code overrides anti-assignment provisions, applicable law here gives a trademark owner clear consent right.

The starting point, Your Honor, is Section 365(c)(1) of the code.

THE COURT: Can I -- can I just interrupt you? I think I understand the basis for the Debtor's objection --

MR. ZUMBRO: The Debtor's?

THE COURT: -- in response to this, but I'm not sure you need to get into all of that.

MR. ZUMBRO: Sure.

THE COURT: Because I think the Debtor has a more limited objection. Your object --

MR. ZUMBRO: More limited response, sir?

THE COURT: Yes.

MR. ZUMBRO: Yeah. Sure, I'll hop right to that. I mean, but basically it just comes down, just quickly, trademark law is very clear that the trademark owner's consent is required unless there's an explicit express assignment provision in the contract. There is an express assignment provision in the contract, but in our case, it's limited to sale of all or sustainably all of the assignments. Those are the only circumstances in which the licensee can assign the license. Right? And we understand, Your Honor, that the Debtor's position is that because all that's left over is being sold to ESL, that satisfies the all or substantially all test.

THE COURT: Right.

MR. ZUMBRO: But that's not a correct recitation of New York law. The Debtor's cite solely and unpublished

chancellor court opinions from Delaware. The actual law in the Second Circuit on this topic is Sharon Steel on the one hand, and Sharon Steel teaches that if there's been a plan of liquidation or a plan of sales, you have to look back to the beginning of the plan, and then you compare what the assets were at the beginning of the plan versus what's now proposed to be sold to test whether it's all or substantially all.

And then there's another case that's also recent where the Delaware Supreme Court was interpreting New York law, and it said very clearly that a sale of all that's left over does not constitute a sale of all or substantially all.

So we think it's very clear, Your Honor, that this --

THE COURT: I'm sorry. So you're saying those cases stand for the proposition that you look at what point in time to determine whether it's all or substantially all?

MR. ZUMBRO: Your Honor, it's not crystal clear under the law. The Debtor will say it's not at the time of the contract. And even if I concede that, if it's at the time of the contract, there was 1,430 stores --

THE COURT: Right.

MR. ZUMBRO: At the time.

THE COURT: Right.

MR. ZUMBRO: But if I point Your Honor to mid-2017

where Sears publicly announced an intention, a plan, to liquidate all of its unprofitable stores in a sort of planned event, I think that's an appropriate time to look back to, which is mid-2017 when they publicly said they were going to start liquidating their stores. So if -- there was about 1,150 stores at that time versus the 425 that are being proposed to be sold today. It's like 30 percent. It's nowhere near all or substantially all.

If we even looked at the petition date, Your Honor, just looked at what's happened during the course of this case, we've gone from 687 stores down to 425 stores which are now being proposed to be sold. That's about 60 percent, Your Honor. That is not all or substantially all under any -- either a common use of the term or what the courts have said all or substantially all means. It's a very high threshold, Your Honor.

So what we're saying --

THE COURT: Well, except -- frankly, as I remember it, the case law was pretty sparse on this either way. I mean, I don't think it said -- the whole issue is the timing issue and when you -- when you -- how you define the process of selling all the assets or substantially all the assets.

MR. ZUMBRO: I'd have to --

THE COURT: I mean, right now it's just two lawyers talking to me. I don't really have a factual record

on that. I know what happened in this case, and I would say that this is a sale of all or substantially all of the assets because it is substantially of the assets. But, you know, I don't -- I don't know what was done pre-petition as far as some sort of formal plan to sell assets.

MR. ZUMBRO: I understand, Your Honor. But even if I could just focus the Court on what's happened during the case while this case has been under your supervision. You know, like I said, the Liberty Media case, which we cite to in direct response to the Debtor's response, says it very clear that purchasing whatever assets are left at the time of the sale, which is exactly what we're doing here, doesn't constitute all or substantially all. We think the --

THE COURT: Well, were those substantially all of the assets on the start of the petition date in Liberty Media?

MR. ZUMBRO: It wasn't a bankruptcy case. It was a plan -- there was a plan --

THE COURT: So --

MR. ZUMBRO: -- in that case where there were sales over a period of time.

THE COURT: So this is -- I mean, it's a really different context the we're in at this point. I mean, they were certainly heading towards this sale.

MR. ZUMBRO: Look, Your Honor. I -- cutting

through it, we think we have a right to determine who our licensee is here, right?

THE COURT: Right.

MR. ZUMBRO: And that's fundamentally what trademark law provides.

THE COURT: I know, but the parties could vary that by their agreement.

MR. ZUMBRO: I understand that, but they -- here their agreement was if someone is purchasing Sears, all of Sears, they can continue the license, but this is not Sears. I think I just heard Your Honor during Mr. Qureshi's presentation say it's not clear to the Court that this is the same company going forward as it was -- as Sears. And we agree with that. We have that same concern.

THE COURT: Well, as --

MR. ZUMBRO: It's not clear to us either.

THE COURT: As far as this case is concerned, these are the assets that matter. The rest was GOB sales. I mean, that's just selling stuff on the shelves.

MR. ZUMBRO: I understand, but our license was very specifically crafted to Sears and to very specifically identified channels of retail to trade, which is defined as Sears retail stores of a certain type, of a certain size. I think you've heard lots of testimony over the last couple of days as we don't know what New Co is going to be going

forward. We don't know what their footprint is going to be like, what their store is going to be.

THE COURT: No, but I know what's being sold, which is substantially all of the assets.

MR. ZUMBRO: It's substantially all of the remaining assets, not of the assets --

THE COURT: Well, it's substantially --

MR. ZUMBRO: -- at the beginning of the plan.

THE COURT: -- all of the assets as of the petition date.

MR. ZUMBRO: I disagree with that, sir. 60 percent is not substantially all. 425 over 687 --

THE COURT: But that's just -- that's -- those are -- those are closing stores. I mean, in terms of your client's brand, I mean, it seems to me that the --

MR. ZUMBRO: Well --

THE COURT: You tell me. You were about to tell me, and I interrupted you. What was it that you think the client wanted to have this mark associated with, that it wanted to be associated with the operating assets of Sears or the sale of inventory and closed, non-operating stores that --

MR. ZUMBRO: It's a bigger issue than just the going out of business.

THE COURT: -- which were liquidized in that first

month of the case.

MR. ZUMBRO: It's not just a going-out-of-business sale. We think that in order for this New Co or new Sears to have the ability to sell Craftsman-branded marks, branded products, they need to enter into a new license agreement with Stanley Black & Decker.

THE COURT: I know that's what you say, but I'm just trying to say what is it -- what is it that you're protecting here?

MR. ZUMBRO: We're --

THE COURT: I mean, I guess if your -- I could understand why you want to have consent in connection with the sale of part of the brand, in essence, to someone and part to someone else and part to someone else. But I can also understand why the parties would agree that if it's basically going to one entity, then it's the same thing. And what you're saying is that the sales that are not to anybody who's using the mark but just liquidation sales, I'm not sure why that -- why that affects the mark and why that wouldn't be consistent with the parties' bargain to say that when substantially all the assets are sold, then the mark can be assigned.

MR. ZUMBRO: Well, Your Honor, I think -- fundamentally, we're trying to protect the quality of the mark and the brand.

THE COURT: Right.

MR. ZUMBRO: Your Honor, there's been a lot of testimony over the last couple days about whether or not New Co is or isn't a viable entity. And that's not --

THE COURT: No, but that's a separate -- that's a separate issue.

MR. ZUMBRO: But it's not, Your Honor, because the ability -- the liability of New Co to continue to use our mark and potentially degrade our mark is very important to us, and the law doesn't impose that risk on the owner of the trademark license. The law --

THE COURT: Unless the parties agree, and I'm trying to understand the basis for the agreement. And I guess -- again, I understand your point, which is that there've been sales of assets of the company during the first couple of months of the bankruptcy case. But they certainly weren't operating or going-concern sales or sales that involve the mark at all.

MR. ZUMBRO: Understood, but --

THE COURT: So it's not -- it's not like it's, you know -- so anyway, why don't I -- I understand your point. I don't think you need to say it -- tell me more. You've succinctly stated it, and clearly. Let me just hear the Debtor on this.

MR. SCHROCK: Your Honor, Ray Schrock, Weil,

Gotshal for the Debtors. Your Honor, I think you have it. When -- if you look at the record in this proceeding, first of all, you know, there was no cross taken even though the opportunity was there if they wanted to build a record around whether or not there was some kind of plan for an extended liquidation, either pre-petition or post-petition.

But the agreement says that if there's a transfer of all or substantially all of the assets, it's a permitted assignment. Clearly, that's exactly what's happening here. I don't think the testimony can be read any other way from, you know, as supported by any party.

When we entered bankruptcy, we had 687 stores, including those stores that were going out of -- had GOBs that were being conducted. We have had to shut down some stores that were unprofitable, but this has been one plan to try and save Sears. And although we're conducting this under an asset sale under 363, there's nothing in this agreement, first of all, that says substantially all of the assets as were held at the time of this agreement. That is not in the license agreement.

THE COURT: No, but I think that's kind of a strawman. The point is that there may be a -- some creeping sale process, but --

MR. SCHROCK: Right, and I understand, you know, Mr. Zumbro, you know, pointing to cases where there's, you

know, several different sales, and it's the last step in a -- in a protracted liquidation process. That's not what we have here. There's been one sale, and clearly the parties were bargaining for this mark staying with Sears. I mean, that's what's happening. These are the Sears stores. I mean, these are the Sears marks and, you know, to try to take Craftsman away from the buyer takes away the fundamental right that we really bargained for, you know, as the -- as the licensee of the mark.

So, Your Honor, we don't think that there's any support, you know, under the law. We think that there's no support in the record, and we don't think that Mr. Zumbro has even built an evidentiary record to support, you know, his position around an extended liquidation or a, you know, a multi-part liquidation, which this would be the last step, and we'd ask you to overrule the objection.

THE COURT: Okay.

MR. ZUMBRO: Just to respond, Your Honor, I think it's quite clear that this company has been in, sort of effectively, a sort of slow-moving liquidation for quite some time.

THE COURT: Well, I --

MR. ZUMBRO: But --

THE COURT: I don't know how that's quite clear. I mean, I don't really have a record on that. I do have a

record of what's happened in the bankruptcy case, but they have consistently said they're pursuing a going-concern sale of the whole business.

MR. ZUMBRO: I understand, but from a --

THE COURT: Are these the same headquarters, the same people running it?

MR. ZUMBRO: A going-concern sale, we don't have any -- we're -- to be clear, we are not objecting to the sale.

THE COURT: No, but what I'm saying --

MR. ZUMBRO: But a going-concern sale --

THE COURT: No, I know you're not. But what I'm saying is when you look at sale of all or substantially all, it's --

MR. ZUMBRO: I guess there's -- I guess I -- perhaps -- I wish I had this in the record, but, you know, Sears made public statements to Eddie Lampert on July 7th, 2017. Said going forward, we have a plan to start selling stores and selling our unprofitable stores, and then only maintaining the profitable stores. I think that's a plan, and --

THE COURT: Well, all right. But --

MR. ZUMBRO: -- that is what has happened since then.

THE COURT: -- it is we, and he's kind of selling

it to himself, right?

MR. ZUMBRO: He is selling it to himself. We understand that, and that's why it's a little awkward, but we do think we bargained for, and we have the right to consent to who holds and has the right to exploit our mark.

THE COURT: Okay. I'm going to -- I'm going to disagree on that. I'm going to deny the objection.

MR. ZUMBRO: Okay.

THE COURT: On the cure, I think it's just reserved; is that right? I thought the -- all the cure objections were reserved.

MR. SINGH: That's correct, Your Honor.

MR. ZUMBRO: That's fine. They didn't object. Just to be clear for the record, they had designated the cure as relating to this IP agreement, and it does, and it relies to a different agreement. So I just want to make sure that the Debtors and we are on the same page --

THE COURT: Okay.

MR. ZUMBRO: -- for that, and I expect you're going to deny this too, but, Your Honor, I would ask for -- I'm not asking for a stay of the sale closing, but I am asking you orally to move for a stay of the Court's order that this license can be assigned tomorrow -- at tomorrow's closing. I'd like a stay of that pending appeal so that we can pursue our appellate rights.

THE COURT: Well, I --

MR. ZUMBRO: Because otherwise, it's part of the transferred assets, as I understand it. Will -- which will be assigned to the -- to the Debtor -- or, excuse me, to the New Co tomorrow, and I don't want to get up in 363(m) and statutory mootness. I'd like to move for a stay pending appeal of the assignment of this particular agreement and their ability to use the Craftsman mark pending our appeal.

MR. SCHROCK: Not surprisingly, Your Honor, we object.

THE COURT: I mean, it's used -- it's in all the stores, right?

MR. SCHROCK: Yeah. It's used in all the stores. There's no bond being posted. I -- frankly, I don't think that -- you know, ESL can speak to this. I doubt the sale is going to be going through if we're not able to use the Craftsman mark.

THE COURT: Well, I mean, just the image of putting a sign on every Craftsman and Black & Decker, it just --

MR. SCHROCK: Yeah.

THE COURT: I think the prejudice is outweighed here.

MR. ZUMBRO: Understood. Thank you for your consideration, Your Honor.

THE COURT: Okay. Is that the line going out the door there?

MS. LIEBERMAN: Hopefully not going out the door, Your Honor.

THE COURT: Okay.

MS. LIEBERMAN: Good afternoon, Your Honor. Donna Lieberman from Halperin Battaglia Benzija.

Your Honor, we represent Paul Ireland, the administrator of the estate of James Garbe. The objection that we filed as at Docket Number 1931, and it's a fairly discrete objection, Your Honor. Although, as you can imagine, it's one that's very important to our client.

Your Honor, the objector as well as the United States of America holds a mortgage against one piece of Sears real estate. That piece of real estate is identified by the Debtors as 8975. It is listed on APA Schedule 1.1(p), the operating owned property. So it is presumably a piece of real estate that the Debtors wish to convey to the buyer.

The objection is very simple, Your Honor. The mortgagees have a perfected first lien mortgage on this property. The Court may recall that we actually filed a limited objection to the DIP motions in connection with this. My colleague, Mr. Halperin, argued that -- and both of the -- both the final DIP orders have specific language

about the fact that this mortgage is not primed. Nobody is pari passu with this mortgage lien.

Your Honor, the face amount of the mortgage note is $17.4 million. There is a provision in the mortgage note and the related documents for a small amount of annual interest as well as a provision for professional fees. I'm sure the Court will not be surprised, as we state in our objection, we do not consent to the sale of our collateral. We want to know that if this -- if this mortgage is not going to be paid at closing that the amount -- that the amount of the mortgage, which we've calculated and we've given the Debtor the precise number, that that amount is segregated and reserved.

THE COURT: Okay.

MS. LIEBERMAN: And obviously the second piece is if we cannot reach agreement with the Debtor about the value of the collateral that either party can bring that issue to this Court on motion.

THE COURT: Okay. So what is the Debtor's proposed treatment of this -- through the sale? I mean, obviously the Lender is entitled to adequate protection of its interest in the property.

MR. SINGH: That's right, Your Honor. We have --

THE COURT: State your name, please.

MR. SINGH: Sorry. Sonny Singh, Weil, Gotshal on

behalf of the Debtors, Your Honor.

I think we've got a very narrow issue here. The valuation reservation of rights, I think we have no problem with that. If we have to come back later and deal with that, we can. And our position simply is that under 363(f), their liens get to attach to the proceeds of sale, excuse me, which -- right here, as Your Honor knows, the transaction is primarily assumptions of liabilities, which are the proceeds that are coming in. There're no other liens on this asset, so whatever those proceeds may be we'll have to fight about another day with the objecting party, but there's no basis to -- they haven't traced -- There's no basis to say we set aside $17.8 million of cash that's just sitting aside in the company's --

THE COURT: Well, I think you need to give them an adequate protection lien on assets then. I mean, I don't know how -- they're actually protected otherwise.

MR. SINGH: I believe under the DIP order -- so, Your Honor, as long as it's not against a particular asset, right, and we don't have to --

THE COURT: But they have a super priority that -- where they're actually covered then. I think that's --

MR. SINGH: Right, which --

THE COURT: And then you can litigate what the actual value was and what you're entitled to be paid.

MR. SINGH: And, Your Honor, I think we would be fine with that because that doesn't require any segregation of whatever funds they're asserting.

THE COURT: Okay.

MR. SINGH: We have no problem with that.

THE COURT: All right.

MS. LIEBERMAN: Your Honor, as you can imagine, our only concern is that once the value is set that we know that the money is there and available --

THE COURT: Right.

MS. LIEBERMAN: -- for our client.

THE COURT: Okay.

MS. LIEBERMAN: Because we have been hearing a great deal about competing claims --

THE COURT: Right.

MS. LIEBERMAN: And whether this is an administratively solvent estate.

THE COURT: All right. So I vaguely remember the carveout in the DIP order. But, I mean, this is a first lien on this property. It's worth what it's worth, and it can't be paid just by a, you know, just saying we're going to pay you someday. They need to have a -- indubitable equivalent in something. So --

MR. SINGH: Yes, Your Honor.

THE COURT: -- you need to give them that to them.

MR. SINGH: I think we could probably add a short paragraph to specifically give the adequate protection lien that Your Honor outlined --

THE COURT: Okay.

MR. SINGH: -- relating to -- with everybody's rights reserved as to the underlying claim.

THE COURT: As to the value and either party's right to --

MR. SINGH: And value.

THE COURT: -- bring the -- bring that issue to the Court.

MS. LIEBERMAN: Thank you, Your Honor.

MR. SINGH: Exactly. Thank you, Your Honor.

THE COURT: Okay.

MR. FONG: Good afternoon, Your Honor. Chris Fong from Nixon Peabody on behalf of US Bank in its capacity as the KCD indenture trustee.

THE COURT: Yes.

MR. FONG: We don't have any objection to the sale. I just rise with respect to a discrete issue that we have with the sale documents with which we would like to reserve our rights.

I think, as you know, US Bank is the indenture trustee under indenture with KCDIP, a non-debtor subsidiary.

THE COURT: Right.

MR. FONG: We've negotiated with the Debtor for the inclusion of what is now Paragraph 10 of the order, which number one reserves our rights as indentured trustee and requires that all the closing transactions that are relevant to KCD be consistent with the indenture.

Paragraph BB of the order requires that as part of closing, KCD enter into an exclusive licensing agreement with the buyer. We have not seen that agreement yet, so I rise just to reserve our rights to ensure that that transition complies with the indenture and that nothing in the order, if it is further modified --

THE COURT: Changes what's already there.

MR. FONG: Changes our risk. Yes, Your Honor.

THE COURT: Okay. That sounds reasonable to me. is there any issue that the Debtors have with that?

MR. SINGH: No, Your Honor.

THE COURT: Okay. Very well.

MR. CICERO: Good afternoon, Your Honor.

THE COURT: Okay.

MR. CICERO: Gerard Cicero from Brown Rudnick on behalf of Primark. Primark leases two properties from the Debtors. Primark is a clothing retailer.

THE COURT: It's a tenant?

MR. CICERO: It's a tenant.

THE COURT: Right.

MR. CICERO: It's a tenant of the property.

THE COURT: Right.

MR. CICERO: One of its -- one of the proprieties it leases is in Pennsylvania where it's a -- the Debtors own that property in fee, and Primark just leases it. And one property is Braintree, Massachusetts. The Debtors actually lease that from a ground lessor and sublease it to Primark where Primark operates its stores.

We -- I arise to let you know that we have reached a temporary resolution of our objection with the buyers, but I wanted to give you a little insight into what's going on.

The first version and the initial versions of the sale orders would've sold the Debtors' interests in their fee property and arguably in their -- the -- their interest in property -- in the property of the ground lease -- they have a ground lease to free and clear of our tenancy and of our leases. And we had raised an objection under a number of grounds -- 365(h), that the Debtors couldn't meet 363(f), and then in the alternative that under 363(e), we would request adequate protection of tenancy.

I would say that the Buyer's counsel and the Debtors have been very helpful and our issue has been punted to another day should they continue to want to try and sell the property free and clear of our leases because they -- there's been an inclusion as far as I understand it in

Paragraph 19 of the sale order that carves out tenants who have objected on these bases to the free and clear -- to the free and clear sale of their -- of their interests in property.

THE COURT: Okay. And you're -- and your client is one of those that's listed.

MR. CICERO: It --

THE COURT: Or it's unlisted. It's anyone who's objected on that basis.

MR. CICERO: Yes. And I --

THE COURT: Okay.

MR. CICERO: And I'm not sure Your Honor has any --

THE COURT: No. I think that's a reasonable --

MR. CICERO: Okay.

THE COURT: -- resolution. I mean, it may be that the two leases are dealt with differently under the law. I don't know. It may be depending on Pennsylvania law, but I understand your objection.

MR. CICERO: Okay.

THE COURT: And I also understand that you're reserving your rights, and therefore the 363(f) objection has actually been waived -- not been waived, excuse me. it's whereas those who didn't like -- well, it be argued it was waived.

MR. CICERO: Thank you, Your Honor.

THE COURT: Okay.

MR. ROSENZWEIG: Your Honor, good afternoon. David Rosenzweig, Norton Rose Fulbright.

THE COURT: Okay.

MR. ROSENZWEIG: I'm jumping in now because we have the same issue.

THE COURT: It's the same issue?

MR. ROSENZWEIG: Yeah. We --

THE COURT: Are you on the -- did you file an objection?

MR. ROSENZWEIG: We did.

THE COURT: Okay.

MR. ROSENZWEIG: We represent Living Spaces Furniture, which is a furniture retailer. Has three stores, two in Arizona, one in California. They sublease from Sears or Kmart the entirety of the store. And --

THE COURT: Okay.

MR. ROSENZWEIG: -- we filed our objection as well raising all those issues 365 --

THE COURT: Right.

MR. ROSENZWEIG: -- H, 363(f).

THE COURT: And E.

MR. ROSENZWEIG: Adequate protection, E, and so we have worked with ESL's counsel to include in Paragraph 19

the reservations for those parties that filed objections.

THE COURT: Okay. That's fine.

MR. ROSENZWEIG: Thank you.

MR. SARACHECK: Good afternoon, Your Honor.

THE COURT: Okay.

MR. SARACHECK: Joe Saracheck. We filed on behalf of MIEN and six other vendors.

First of all, I want to say thank you to Mr. Lampert for stepping up; and to the Court; to Weil, Gotshal and the professionals who worked on this.

I represent trade vendors who really need Sears to stay in business. They want Sears to stay in business. These -- you know, you talked about 45,000 employees, but with 10,000 vendors, there are thousands -- there's probably hundreds of thousands of families of vendors who are dependent on Sears to stay in business.

That said, we're totally supportive of this sale. The issue is timing of payment. And I've been before you before to talk about the 503. You asked the creditors' committee attorney had he thought of any ideas.

You know, quite frankly, this is an unusual situation, and we are suggesting that the Court appoint a 503(b)(9) ombudsman, an independent party to make sure that -- there is a 120-day period by which ESL is supposed to pay --

THE COURT: Well, it's the shorter of a plan confirmation or 120 days.

MR. SARACHECK: Right, but presumably --

THE COURT: There's a lot of incentive here to get a plan done very fast because there's -- you know, we just want to set up a litigation trust, basically. So -- but I understand. Listen, I --

MR. SARACHECK: So --

THE COURT: I'm sorry to interrupt you.

MR. SARACHECK: No, Your Honor. So, you know, it's a suggestion, just so you know. I'd like to take credit for it, but there are always kind of far more brilliant bankruptcy lawyers out there.

THE COURT: Well, can I -- can I interrupt you?

MR. SARACHECK: Yes.

THE COURT: First of all, it's M-E-N-E, right?

MR. SARACHECK: M-I-E-N.

THE COURT: M-I-E-N.

MR. SARACHECK: And, by the way, they're the nicest people, even though their name is Mien.

THE COURT: All right. So I -- my reaction to that is the following. It seems to me that with -- if I were to approve the sale, the likelihood of these claims getting resolved promptly goes way up because there's actually someone to negotiate with then who's a customer of

the vendor.

I think that if the Debtors and ESL don't work out a process promptly to deal with 503(b)(9) claims, then someone should ask for a case conference to just literally deal with that issue. But before doing that, or before adding another layer of administrative expense to the estate through another professional, I would like to see the -- now that -- well, if, in fact, I approve the transaction, now that there would be a customer on the other side to deal with the vendor, I think those things move a lot faster in that context. If it doesn't -- and by that, I mean like in another few weeks, two or three weeks, you know, that sort of thing -- then I think I might have to actually direct a process, which may involve an administrative layer expense or it may just say, look, you've got to do this now. You've got to have a process to deal with these claims now that will involve the vendor and the buyer as well as the Debtors.

MR. SARACHECK: Because of, course -- thank you, Your Honor.

THE COURT: Because these -- a lot of these are small businesses.

MR. SARACHECK: They are.

THE COURT: And they're facing their own financial troubles. I get that.

MR. SARACHECK: And the issue, of course, is that the definition of receipt and --

THE COURT: Right.

MR. SARACHECK: You know.

THE COURT: So there's -- so there's -- there are two things. There's a legal process issue and there's a business process issue. What's been lacking so far, I think, is the business process because you didn't know whether this was going to go to liquidation or sale.

If it goes to a liquidation, then that should happen right away. I understand that the process of liquidating this claim should happen right away. If it goes to the sale, then I would like to give the Debtors and the Buyer two or three weeks to come up with a process that will work so that they can be communicating with the vendors directly and resolving those issues. If that doesn't happen, then someone like yourself can put it on the calendar so we can go over it.

MR. SARACHECK: Thank you. One other point I want to make about the 160 million, and I'm not sure I fully appreciate the issue. But if the issue is what I think it is, which is current accounts payable, you know, I want to say to everyone these vendors need to be paid, and they need to be paid timely because they are out of a lot of money. They're recognizing that they're -- or realizing that their

unsecured claims are likely worthless and -- other than their 503(b)(9), and they need to be paid. And this is a big, big issue.

THE COURT: Okay.

MR. SARACHECK: I mean, this is an issue that China will hear about in minutes --

THE COURT: Okay.

MR. SARACHECK: -- after this hearing. Thank you, Your Honor.

THE COURT: Right. Thank you.

MR. HONEYWELL: Good afternoon, Your Honor. Robert Honeywell, K&L Gates for Amazon.com services.

THE COURT: Afternoon.

MR. HONEYWELL: Very briefly, we're one of the parties that cares about the language in Paragraph 19. There's some procures for reserving recoupment and sell-off rights. We've worked on new language to the 4-AM order that will fix that, and we're just reserving our rights.

THE COURT: Okay.

MR. HONEYWELL: It's a minor, minor glitch. We've worked it out with the Debtor's attorneys and ESL's.

THE COURT: All right. So this is not in the redline I got, but --

MR. HONEYWELL: It is not in the redline.

THE COURT: But it's --

MR. HONEYWELL: It's literally a two-word glitch.
THE COURT: Okay.
MR. HONEYWELL: That has to do with notice procedures.
THE COURT: Okay.
MR. HONEYWELL: So we worked it out, and we're just reserving our rights.
THE COURT: Okay.
MR. HONEYWELL: Thank you.
THE COURT: Is that right from the Debtor's point of view?
MR. SINGH: Yes, Your Honor.
THE COURT: Okay.
MR. CHAFETZ: Hello, Your Honor. Eric Chafetz of Lowenstein Sandler of behalf of two, LG Electronics Entities and Valvoline LLC. I rise for the same reason as Mr. Gates. We've been negotiating that Paragraph 19 language as well, and we saw what we think is the final version. Just reserving our rights.
THE COURT: The same words?
MR. CHAFETZ: Exactly.
THE COURT: Okay.
MR. CHAFETZ: Exactly. And, yeah. Thank you, Your Honor.
THE COURT: Okay.

MR. SINGH: Your Honor, before anybody else gets up, I promise we'll fix that language.

THE COURT: All right. Very well.

For those of you on the phone that want to be heard, I -- no one's coming up to the podium, so this is your time.

MS. COLON: Your Honor, Sonia Colon on behalf of Santa Rosa Mall LLC. Santa Rosa's objections on their docket 2013 --

THE COURT: I'm sorry. Can I -- can I get the name -- ma'am, can I get the name of your client again? It went by very quickly.

MS. COLON: Sonia Colon on behalf of Santa Rosa Mall LLC.

THE COURT: Santa Rosa Mole, LLC. Okay.

MAN 1: Mall.

THE COURT: Mall. Sorry. Long day, ma'am. I'm sorry. Very well. Yes, ma'am.

MS. COLON: Santa Rosa's objections on their Docket 2013 and Docket 2425 were filed to protect and to preserve its rights to some hurricane insurance profits for a store that was destroyed as a result of Hurricanes Irma and Maria in 2017 in Puerto Rico.

Although Santa Rosa does not object to the proposed asset sale transaction in principle, it does object

and reserve its rights with regards to the proposed retention of 13 million in hurricane-related insurance profits when Santa Rosa is a loss payee under the insurance policy for Store 1915 until its motion to compel Debtor to deposit insurance profits under Docket (indiscernible) is resolved in February 14th.

Further, Santa Rosa reserves its rights to the transfer of any hurricane insurance profit that may have been dispersed under the proposed agreement. Note that under the APA, acquired assets include any and all insurance assets with respect to a loss or damage to any acquired assets occurring prior to the asset purchase agreement.

Despite Debtor's objection last Friday under Docket 2013 at Pages 96 and 97 that the $13 million were unrelated to any insurance coverage under a lease agreement. The sworn statements filed that day by Sonny Singh under Docket 2344 and William Transier under Docket 2341 shows that $13 million were in fact hurricane insurance profits.

THE COURT: Okay. So could -- if I could understand, you're --

MS. COLON: -- (indiscernible) in an effort to --

THE COURT: I'm sorry, ma'am. So let me make sure I understand. You're reserving your rights. There's a hearing scheduled for Valentine's Day, I guess on the merits of this issue, or at least partly. And I guess the Debtors

are reserving their rights too. I mean, you can't sell what isn't yours, so --

MR. SINGH: Your Honor, just --

THE COURT: I mean, if it is yours --

MS. COLON: (Indiscernible), Your Honor --

THE COURT: -- we can -- we (indiscernible) the Debtors can sell --

MS. COLON: -- we need to reserve our right.

THE COURT: Yeah.

MS. COLON: We need -- Santa Rosa needs to -- and they agreed to reserve our rights with respect --

THE COURT: Okay.

MS. COLON: -- to the insurance profits that were received by the Debtors or any third parties for the damages by Hurricane Irma and Maria, but also that may be received by the purchasers because under the acquired assets that can be insurance profits as well.

THE COURT: All right. But again --

MS. COLON: So we need to reserve the rights.

THE COURT: Yeah.

MS. COLON: We proposed language that should be included in the proposed order to the Debtors, but they did not include the same in the proposed orders, the redlines, that have been submitted to this Court.

THE COURT: Okay.

MS. COLON: So we submit to this Court, Your Honor, that (indiscernible) reservations be included in Sections 3 regarding the objections of (indiscernible) and also in the free and clear of any claims because claims -- it should be limited that any claims shall be limited to loss or damages for those caused by Hurricane Maria. We have submitted that --

THE COURT: No, it's a different -- I think --

MS. COLON: -- language to the Debtor.

THE COURT: I think it's a different concept. The free and clear point goes to claims or interests in assets that the Debtors own. If the Debtors don't own the asset, if they don't -- if it's not a -- if it's not property of the estate, if it's actually someone else's, then they can't sell it. So I'm fine with a reservation like that.

MR. SINGH: That's right, Your Honor.

MS. COLON: We request, Your Honor, that they reserve that reservation language of the Santa Rosa be specifically included in the order, but the Debtors have refused to include it in the redline.

MR. SINGH: Your Honor, Sonny Singh. If I could just respond really quick. There's a reference to $13 million of insurance proceeds that are not being sold, to which the claimant -- that, you know, is coming back to the estate to which the claimant is asserting claims. Their

rights are reserved. Our rights are reserved. We can be heard on the 14th. There was a lot of back and forth on the language of the order. Frankly, Your Honor, what Counsel laid out, I'm happy that their rights are reserved would stipulate that that is all fine, and we'll deal with it on the 14th. These are not proceeds that are actually being transferred. The $13 million referenced in the APA is actually a reference to being retained by the estate, so it's not going anywhere.

THE COURT: All right. Well, I think Counsel is worried that --

MS. COLON: (Indiscernible).

THE COURT: Let me finish, ma'am. Please. I think --

MS. COLON: Yes.

THE COURT: I think you were worried that in the future, proceeds might be transferred, future proceeds that might come in. And I don't know whether those are proceeds that the Debtor can sell or not, but to the extent the Debtor can't sell them, then they can't.

MR. SINGH: Then they're not subject to 363(f), and we can't transfer them.

THE COURT: All right. I mean -- I mean, I don't think we need to put in the order because it's a given that you can't sell assets that you don't own, you know. And

you're not making a representation to ESL that you can sell assets that you don't own, right?

MR. SINGH: No, of course not, Your Honor.

THE COURT: All right. So I think -- I think your point is noted on the record, ma'am, and I think it's clear.

MS. COLON: Noted, Your Honor.

THE COURT: Okay.

MS. SONGONUGA: Good afternoon, Your Honor. Natasha Songonuga of Gibbons P.C. on behalf of the American Lebanese Syrian Associated Charities Inc. It is a not-for-profit Section 501(c)(3) corporation founded exclusively to raise funds for St. Jude's Children's Research Hospital, Your Honor.

St. Jude's does not have and does not object to the sale motion. As a matter of fact, Your Honor, I wanted to be clear that St. Jude's considers Kmart, which is the Debtor that the relationship exists with, to be part of the St. Jude's family, and together both St. Jude's and Kmart have made a tremendous impact on the mission of St. Jude's, which is finding cures and saving children.

I've filed a limited objection on behalf of St. Jude's at Docket Number 1947, Your Honor. And without going into the specifics of that objection, I was advised yesterday by email that either Debtor's counsel or ESL's counsel would be making a representation to the Court

regarding that limited objection. And so far, I have not heard that representation made to the Court, so I'm waiting for the representation.

THE COURT: Well, now is the time. So let me --

MR. SINGH: Your Honor, Sonny Singh, Weil on behalf of the Debtors. The Debtors and the Buyer will work with St. Jude's to review and work towards reconciliation of the among of funds to be turned over to St. Jude's on March 1 pursuant to the applicable contract, and the party's rights are preserved and will not be prejudiced by the sale transaction.

THE COURT: Okay. Was that the language?

MS. SONGONUGA: Your Honor --

THE COURT: Was that the language you were looking for?

MS. SONGONUGA: Your Honor, that -- Your Honor, that addresses one part. To be clear, the Debtors continue to collect donation. There is actually currently a Valentine's Day donation campaign ongoing in the stores, and the Debtors continue to collect donation on behalf of St. Jude's. Those donations are not due on March 1st. They are not part of the proceeds that are due on March 1st, so --

THE COURT: But they're not -- they're not being sold.

MS. SONGONUGA: -- that representation --

THE COURT: I mean, these -- again, it's --

MS. SONGONUGA: Well --

THE COURT: It's the same point. It's even worse here. I mean, you can't -- you can't -- you can't sell what you don't own.

MS. SONGONUGA: Your --

THE COURT: You certainly can't sell what people have decided to give to St. Jude's.

MR. SINGH: Yes, Your Honor.

MS. SONGONUGA: Your Honor, exactly. And we agree with that, Your Honor. It was not a matter of selling those donations. It was just simply a matter of ensuring that the purchaser would be collect -- continuing to collect those donations on behalf of St. Jude's.

MR. SINGH: Yes, Your Honor. We will work with St. Jude's.

THE COURT: To do that.

MR. SINGH: To deal with the reconciliation and all -- and the Buyers agreed to do that too.

THE COURT: Okay. Not just --

MS. SONGONUGA: Thank you, Your Honor.

THE COURT: -- as of that particular date.

MR. SINGH: Not limited to March.

THE COURT: But going --

MR. SINGH: Not limited to March 1.

THE COURT: Going forward.

MR. SINGH: Whatever the amounts are.

THE COURT: Okay. Very well.

MS. SONGONUGA: Thank you, Your Honor.

THE COURT: Okay. I think that I can assume, then, that the other objections are either, as was precisely stated, being adjourned -- and that's largely the cure objections -- or have been resolved, or the parties are reserving as -- to a mechanism to resolve them; is that a fair --

MR. SINGH: Yes, Your Honor.

THE COURT: -- summary.

MR. SINGH: That's exactly right, and we've got -- you know, we built in most of that language, I'd say 99 percent of it, in the order that was filed last night. We've gotten some clean-up changes throughout the day today that we can build in. I don't think it's even worth reviewing on the record, and some of the stuff the counselors have already -- have already notified --

THE COURT: Okay.

MR. SINGH: -- Your Honor about. And we've also worked out the clarification on the Cyrus release language that Your Honor mentioned earlier.

THE COURT: Okay. All right. So, you know, it's late in the day. It's much longer than I thought we would

have on this. But I'm happy to hear a very brief response by those who are seeking approval of the transaction.

MR. BASTA: Your Honor, Paul Baste from Paul Weiss for the Subcommittee. I literally have one minute.

THE COURT: Okay.

MR. BASTA: The -- Mr. Qureshi pointed out my testimony from the podium. All the numbers in my argument tie to Mr. Carr's declaration. Your Honor --

THE COURT: Well, the other thing about -- in bankruptcy cases, there are times when the lawyers who are speaking to you were intimately involved in the very things that they're being asked about, such as when did a meeting take place, etc. So I take those representations by people who are subject to discipline from me as close to evidence.

MR. BASTA: Understood, Your Honor. Your Honor had a discussion with Mr. Qureshi about what it meant to give up equitable subordination because, as a remedy, it would mean that the Debtors would then have to go and chase a recovery.

THE COURT: Right.

MR. BASTA: A primary defendant in the Debtor's litigation claims that is not included in the complaint that's attached to the standing motion that the committee filed is, of course, Seritage. And if Your Honor looks on Yahoo, you'll see that Seritage has a market cap of $2.27

billion, and ESL's interest in --

THE COURT: Well, that actually is evidence. But I understand.

MR. BASTA: No, no. I'm just saying -- I'm just saying -- I know that is evidence. I'm just saying that MR. -- ESL owns 45 percent of Seritage. So when we looked at it from the collection issue, there -- Mr. -- ESL has a significant interest in Seritage, which has a large market cap. And Seritage itself is a significant defend. The --

THE COURT: Okay.

MR. BASTA: The third point, Your Honor, is -- Mr. Qureshi pointed out that the letter from ESL attacking the subcommittee somehow trained the process. I think the record is uncontroverted that Mr. Carr and Mr. Transier made their decisions without any fear and without any bias and, in fact, rejected the ESL bids after the receipt of that letter.

THE COURT: Okay.

MR. SCHROCK: Your Honor, Ray Schrock, Weil, Gotshal for the Debtors. Subject to any questions you have, I actually am willing to stand on the record on this before you.

THE COURT: Well, I actually did have -- I did have a couple questions I forgot to ask you when you were speaking this morning. I have the statement by the consumer

privacy ombudsman in which she makes a number of recommendations. She said as long as the Debtors and ESL abide by those recommendations, she supports the sale. She thinks it's -- you know, it's proper as far as the bankruptcy code and applicable law with regard to consumer identifying information and other related topics.

So I -- have the Debtors and ESL agreed to those recommendations?

MR. SCHROCK: Yes, we have, Your Honor.

THE COURT: And ESL too?

MR. BROMLEY: Yes, Your Honor.

THE COURT: Okay. That's Mr. Bromley?

MR. SCHROCK: Yes.

THE COURT: Okay. All right. And then my other issue here is what is your response on the argument that Mr. Qureshi made that certain of the assets being purchased here aren't being purchased with the non-credit-bid portion of the sale?

MR. SCHROCK: Your Honor, I just don't think that's -- frankly, that's inconsistent with the asset purchase agreement, that assertion as well as, you know, the record in these -- in this case. They are -- ESL is purchasing, you know, with the credit bid, and then they are paying off, you know, senior secured claims. Those -- and, by the way, we keep calling them the unencumbered assets.

The DIP loans have liens on those assets, of course. The DIP loans have to be paid -- repaid.

THE COURT: Well, on -- the DIP loans have liens on Dove & Sparrow?

MR. SCHROCK: Certainly on the -- I believe on the equity, the underlying equity that the Debtors hold.

THE COURT: Okay.

MR. SCHROCK: That's correct, Your Honor.

THE COURT: And IPGL?

MR. SCHROCK: Yes.

THE COURT: Okay.

MR. SCHROCK: Yes, and so there's, you know -- as Your Honor noted, there's 3.9 billion --

THE COURT: So it's like 850 million of DIP loan.

MR. SCHROCK: That's correct. There's 850 million of the DIP loans. There's $350 million junior DIP --

THE COURT: Okay.

MR. SCHROCK: -- that's there.

THE COURT: And the --

MR. SCHROCK: The assumption of liability

THE COURT: The committee's -- I'm sorry to interrupt you, but the committee's argument is that there's $560 million equity value in Dove & Sparrow, and 300 and -- I'm sorry, 233 in IPGL, so that's less than the DIP loans, I guess.

MR. SCHROCK: Then, Your Honor, I would -- we'll rely on the record as to the value of the collateral, but I -- you know, we didn't get there on the math.

THE COURT: I'm just saying --

MR. SCHROCK: It was in the presentation.

THE COURT: I mean, assuming that value.

MR. SCHROCK: Yes.

THE COURT: Okay. Any -- Mr. Qureshi, any response on that?

MR. QURESHI: Your Honor, I'm not sure that that's consistent with how the DIP order is supposed to work, and in particular the marshaling provisions under the DIP order.

THE COURT: All right. I thought -- I mean, I thought they waived marshaling. I mean, they normally do.

MR. QURESHI: I mean, Your Honor, again, I'm -- I don't think that's how --

THE COURT: Can I -- can I interrupt you? I know there were reservations of rights with respect to the junior DIP.

MR. QURESHI: Yes.

THE COURT: But on the senior DIP, I thought there was a waiver of 506(c) and marshal.

MR. QURESHI: Your Honor, I'll let Mr. Dublin handle that question. He's more --

THE COURT: Okay.

MR. QURESHI: -- familiar with the DIP provisions.

THE COURT: He's the financing guy.

MR. DUBLIN: Phil Dublin, Akin Gump on behalf of the Committee. I apologize, Your Honor. I don't have the DIP order handy, but when we negotiated the DIP, the final DIP order with the ABL lenders, we actually had a whole construct of marshaling built in where there was marshaling waiver, except there's a provision in the back of the order, which I don't remember the paragraph number, that provides that even in connection with a sale process, the proceeds of the sale are supposed to be used that are -- that are applicable to what was pre-petition ABL collateral -- I think that might be the defined term -- are used in a specific order of distribution such that, for example, here, since the new ABL loan is being funded and the collateral for the new ABL loan is the -- are the ABL assets that exist at the company, the proceeds from that new ABL loan that come into the estate should be used to repay the existing ABL DIP thereafter whatever pre-petition ABL obligations have not been repaid, which I think what's left is the FILO and the LC facility, which have liens on the ABL assets. And then after that, there's a whole litany of order of marshaling. That's also included in the junior DIP order. And I apologize I don't have the document with me, but I believe that that's the way the marshaling provisions work,

notwithstanding the fact that technically there's a marshaling waiver.

MR. SCHROCK: But again, Your Honor, we don't have the luxury of evaluating this bid in a vacuum. There's -- undisputably -- indisputably, there's billions of dollars of assumed liabilities that are general unsecured claims, administrative claims that are being, you know, put into -- and are being paid off.

THE COURT: I understand that point.

MR. SCHROCK: Right.

THE COURT: If you look at it in the aggregate --

MR. SCHROCK: Right.

THE COURT: -- I understand it. Dove & Sparrow are separate debtors, or are they --

MR. SCHROCK: The Sparrow entities are in a -- it's a REMIC structure where we hold the equity. They're non-debtors.

THE COURT: Right. So, I mean, in terms of the --

MR. SCHROCK: But that equity is held by the Debtors.

THE COURT: But I'm assuming, because I thought they were like special purpose real estate entities, that they don't have a lot of the types of debts that ESL is taking on. So you have to look at other value that's going to them, which would be the DIP unless there's some

carveout.

MR. SCHROCK: Right, Your Honor. But, you know, I think when I just look at the -- when you think about the -- in a wind-down, right, there's going to be a number --

THE COURT: No, I -- all I'm saying is I just want to make sure --

MR. SCHROCK: Mh hmm.

THE COURT: -- that the sale is fair to those particular debtors. Now, the easiest way to make sure of that is to see whether they are obligated in respect to debts that are being repaid one way or the other, including with cash by taking out the DIP. On the --

MR. SCHROCK: But we've been -- we've been servicing their collateral with money that's being generated from sales. You know, it's an integrated operation.

THE COURT: Well, I -- the other way to ensure that it's fair is to recognize some sort of inter-company claim against the, you know, the people that get the better benefit. But --

MR. SCHROCK: Those are all reserved.

THE COURT: All right. But I would like to look at the DIP order, which I had printed out actually last night. So I think you could find it pretty quickly.

MR. SCHROCK: Okay.

THE COURT: Okay. All right. Anyone else? Okay.

Oh, I'm sorry. Mr. Bromley, I've got a question for you.

MR. BROMLEY: Great. That's why I sat over here.

THE COURT: This issue about the 166 million, your favorite issue, I have the schedule now. There's no dispute that that was the schedule that was attached to the agreement, correct?

MR. BROMLEY: Correct.

THE COURT: And I have the provisions in the agreement that relate to this issue. There's the assumption provision and there's the cross-reference to the definitional provision of other payables.

So I understand the Debtor's argument completely on this one. What is the -- in terms of the plain language of the agreement, what is ESL's argument?

MR. BROMLEY: Can I get the document, Your Honor?

THE COURT: Sure.

MR. BROMLEY: So, Your Honor, the -- do you have the document in front of you?

THE COURT: I thought I did, but... The Debtors have the most recent version. Do you have that, that you could give me, of the APA, the copy?

MR. SINGH: Your Honor, there's been no change to the original version.

THE COURT: Oh, I'm --

MR. SINGH: But we do have copies.

THE COURT: So do the -- do the -- so the amendments don't cover this.

MR. SINGH: The amendment does not relate to this issue.

THE COURT: They don't relate to it. I thought I had it. I'm not quite sure why I don't.

MR. SINGH: But we do have extra copies if Your Honor (indiscernible).

THE COURT: Could you give me an extra copy just so we don't spend --

MR. SINGH: Yes.

THE COURT: -- more time looking for it?

MR. SINGH: Just a moment, Your Honor. We have to find the box. Just the transition over.

THE COURT: Yeah. Do you have a copy?

MR. BROMLEY: I only have --

THE COURT: Maybe you can just read me this out.

MR. BROMLEY: Okay. I'll just read it to you, Your Honor.

MR. SINGH: Your Honor, it is quoted in -- sorry -- in the presentation if you'd like to read it.

MR. BROMLEY: Oh, do you have the Debtor's presentation from earlier?

THE COURT: Yes. The slides from today?

MR. BROMLEY: Yeah. It's Slide 24. 24, Your Honor.

THE COURT: Okay.

MR. BROMLEY: That's the -- that's the relevant language that's quoted.

THE COURT: Right. Okay.

MR. BROMLEY: So, Your Honor, the way that the document works is Section 2 of the asset purchase agreement, Article 2, deals with purchase and sale with Section 2.1 being the purchase and sale of the acquired assets, and Section 2.2 dealing with the excluded assets. Section 2.3 deals with the assumption of liabilities.

So this is the way a standard asset purchase agreement is structured, so what you're buying, what you're not buying, and then what you're assuming.

So Section 2.3 is the assumption of liabilities, and the header for that, you know, says that the -- on the closing date, the Buyer shall assume effective as the closing and timely perform and discharge in accordance with their respective terms the following liabilities. If you have a 2.3(k), it's -- there's several things that are going on in 2.3(k), and it has a total of 10 subsections.

So what 2.3(k) says that the assumed liabilities include the severance reimbursement obligations, the -- which is a defined term -- the assumed 503(b)(9)

liabilities, other payables -- defined term -- and all payment obligations with respect to the ordered inventory. All right.

And then there's the sub -- 10 subsections which I'll -- a couple of them reference these terms.

But then when you go back to the definitions, so you have other payables as a defined term and ordered inventory as a defined term.

MR. SCHROCK: And, Your Honor, those are on the next page, the next slide.

THE COURT: Okay.

MR. SCHROCK: Ordered inventory as well as the other (indiscernible).

THE COURT: Right.

MR. BROMLEY: And so when you look at other payables, and that is on Page 24, other payables shall mean the accounts payable set forth on 1 point -- Schedule 1.1(g).

"Ordered inventory," another defined term, "shall mean inventory," which itself is a defined term, "other than prepaid inventory," again, a defined term, "of the type set forth on Schedule 1.1(f), that has been ordered by the Sellers, prior to the closing date, but as to which the Sellers have not taken title or delivery prior to the closing date," all right? So, if you go back to 2.3(k), the

-- and look at the -- and each of those have a schedule, right? So, if you go to Schedule 1.1(f), which is Ordered Inventory, and I'm not sure if that's in your chart.

MR. SCHROCK: It is.

MR. BROMLEY: Okay. Can I actually see -- I just wanted to make sure --

MR. SCHROCK: Yeah, this is in there.

MR. BROMLEY: Great, thank you. Okay, and that's on Page 23 of the charts, of the slide deck that you got this morning, Your Honor.

THE COURT: 25, isn't it?

MR. BROMLEY: I'm sorry. 25, yes. And that's -- that box at the bottom is exactly how it appears, and how I've cut it out and put it in the back of my binder. And so, what does it say? It says, "Ordered Inventory." "Ordered Inventory," and then it says: "As of January 7, 2019." And it has two categories, Domestic and Imports, it has a Total line -- Total on Order, Less Paid In Transit, Less on the Order, Total Amount of Ordered Inventory, and you go all the way over to the far right-hand side, $278 million dollars total on order, deducting what has been paid in transit, and is on the order, which is also, in effect, title as transferred, you get a total of $166,557,000, all right? But there's two things that are important to keep in mind about the way that Schedule 1.1(f) is written, and how

Ordered Inventory is defined.

Ordered Inventory on Schedule 1.1(f) is Ordered Inventory as of January 7, 2019, so this is an example, Your Honor. This is not a definition, this is going to be the Ordered Inventory as of the moment of closing, because if you go back to what the definition of "closing" is, it says: "Goods of the type set forth on Schedule 1.1, so it's not saying it's exactly on 1.1, meaning 1.1(f) is an example. That has been ordered by the Sellers prior to the closing date, as to which the Sellers have not taken title or delivery prior to the closing date. So, what we have is, anything as to which there are orders out, but it hasn't been delivered, title hasn't been taken. That's what Ordered Inventory means.

It just so happens that on -- as of January 7, 2019, Schedule 1.1(f) had a number of $166.6 million dollars. That is what, from ESL's perspective, in terms of the negotiations it was having with respect to the bid letter that it put in, dated January 5th, because that's when this was added in, the expectation through ESL is that what we were doing with respect to the accounts payable was that we were taking accounts payable that relate to Ordered Inventory, that is accounts that are going -- amounts that are going to be due for inventory that was paid that has not yet been received, but will be delivered after the closing

date, right? And so, that number is 166 -- as of January 7th, was $166.6 million dollars.

And it was that number that we were operating in respect of. Now, Other Payables is a defined term as well, and if you go 2.3(k), it says Other Payables is the Accounts Payable set forth on Schedule 1.1(g), and that schedule was made public today, and that schedule simply is an amount that says $166 million dollars, that is on Page 24 of the dec from this morning.

Right, so there's no -- Schedule 1.1(g) is not a schedule of particular payables, it's a dollar amount, right? And so, if you go further down, in 2.3(k), and there's subnumbers, romanettes (i) through (x), there is romanette (v): "Buyer's obligation with respect to the Other Payables shall not exceed $166 million in the aggregate." It's not a coincidence that the number $166 million is with respect to both the schedule relating to Ordered Inventory, or Other Payables, because it was, indeed, the other party's intention, at least as ESL's point of view, that what Other Payables meant in 2.3(k) is that it's Other Payables and payment obligations with respect to the Ordered Inventory. So, that total amount is $166 million dollars, the Schedule 1.1(f) makes it clear that the Ordered Inventory expectation was $166 million dollars.

THE COURT: Yes, but it -- if it was Other

Payables and all payment obligations, then you defined Other Payables as -- and all -- in five -- (k) little roman (v) you'd say: "Buyers obligations with respect to the Other Payables and all payment obligations shall not exceed $166 million." And this just refers to the Other Payables, not the clause that follows it: "and all payment obligations with respect to Ordered Inventory."

MR. BROMLEY: I hear what you're saying, Your Honor, but there's no other use of the word Ordered Inventory. What we're talking about here is, it may be that Ordered Inventory is an -- is an additional defined term that's not necessary, but what we're talking about is --

THE COURT: Well, the parties defined it.

MR. BROMLEY: But it's the exact same definition. It's $166 million dollars. It's the same number, Your Honor.

MR. SCHROCK: But that would -- but that's why we had --

THE COURT: Well, then, why are you fighting over it? It's the same thing, then it's $166 either way.

MR. BROMLEY: The point is, Your Honor, whether there's two $166s or one, the schedule that Mr. Schrock refers to, it's not a schedule, it's just a number on a page. That's not a schedule.

THE COURT: No, but it is, because that's what the

schedule says.

(Laughter in the Courtroom)

MR. SCHROCK: Right, but Your Honor, that -- the Other Payables are payables that exist, right, that were -- that we specifically negotiated as a bridge (indiscernible).

THE COURT: I don't care what people negotiated. It certainly looks to be that the parties used two different terms, they've actually defined them differently, and put a cap on one, and assumed the other one.

MR. BROMLEY: Your Honor --

THE COURT: Now, it may be that, definitionally, they overlap, in which case, there's no reason to pay more than once, but if they don't overlap, then --

MR. BROMLEY: But Your Honor, I think, at a minimum, there's an ambiguity here, and there's no documents in the record because this is not the time to do it but it's clear that the communication --

THE COURT: Well, I'm not deciding this issue today, because I can't, but I don't see an ambiguity.

MR. BROMLEY: All -- well, I'm saying --

(Laughter in the Courtroom)

THE COURT: I mean, you can't make one by saying -- you can't say one -- you can't make one under New York law by saying the parties disagree about what they meant, unless the document itself is ambiguous.

THE COURT: -- oh, I have it. Yeah.

MR. BROMLEY: I understand, Your Honor. Look --

THE COURT: Can I interrupt you just for a second?

MR. BROMLEY: Oh, sure.

THE COURT: Is Mr. Dublin here, still?

MR. DUBLIN: Yes.

THE COURT: Behind the pillar.

MR. DUBLIN: Just stepping on the --

THE COURT: Can you --

MAN: -- yeah, sure.

THE COURT: Can you look and see where this provision is in case --

MR. SINGH: Yeah, Your Honor, I think it's Paragraph 13 of the final.

MR. BROMLEY: Paragraph 13 for the (indiscernible).

THE COURT: Let me just -- what page is that, do you know?

MR. SINGH: It starts on Page 37, if you have the Senior DIP Order, Your Honor.

THE COURT: Okay, yeah, I do.

MR. SINGH: It's a very, very long paragraph.

THE COURT: I'm sorry.

MR. BROMLEY: That's okay.

THE COURT: I mean, I think that's -- I don't need

-- I don't really need -- now I understand the rationale.

MR. BROMLEY: But I have some more, so.

THE COURT: Okay, all right, go ahead.

MR. BROMLEY: Oh, you --

THE COURT: No, go ahead.

MR. BROMLEY: Oh, I'm sorry, Your Honor. Yeah, so, the fact is that, that's not the only point. There's two -- that these two definitions are sitting here together is not happenstance, but what we're talking about as well is that there is an ongoing obligation of the Debtors to -- with respect to these numbers, to be performing the business in the -- to operate the business in the ordinary course. To order things and pay for them as they come due, right? And what we know --

THE COURT: That's a separate issue, though.

MR. BROMLEY: Well, it's the --

THE COURT: And the Debtors haven't looked for a different interpretation of that.

MR. BROMLEY: Well, it is and it isn't, Your Honor. To the extent that the -- what has happened is, to the extent that there's two buckets, which we don't agree with, and this one bucket is being filled up because what is happening is, the Debtors are not paying their obligations as they come due, they're violating another portion of the agreement. This is an extraordinarily complex document, but

it cannot be that, on the one hand, the Debtors can choose voluntarily not to pay things --

THE COURT: All right, but that -- now we're kind of shift -- but the Debtors are willing to live with the Ordinary Course provision, right?

MR. SINGH: We are, Your Honor.

MR. BROMLEY: Well, Your Honor, to the extent that there's a dispute going forward, I just wanted to let you know, the issues are, right, as to whether or not the Debtors are performing --

THE COURT: I understand that point. I think -- correct me if I'm wrong, but I think the concern that the Special Committee and the Debtors had was that, was not over that issue, but rather, over the first argument you made.

MR. BROMLEY: Oh, I know because they're -- they're not concerned about the first issue because it helps them, because what they've been doing is not performing in the ordinary course --

THE COURT: No, but that's a separate -- the Ordinary Course is a separate provision. They'll live with that.

MR. BROMLEY: They relate to each other, Your Honor.

THE COURT: Well, I don't know.

MR. BROMLEY: So.

THE COURT: Okay. All right, thank you.

MR. BROMLEY: Thank you, Your Honor.

THE COURT: So, I'm sorry, now, Page 37, you said, Mr. Singh?

MR. SINGH: Your Honor, (indiscernible).

THE COURT: Well, this is the --

MR. SINGH: One second, Your Honor.

THE COURT: This is the five-page paragraph.

(Laughter in the Courtroom)

THE COURT: Okay.

MR. SINGH: Your Honor, are we looking at ECF 5 if (indiscernible).

THE COURT: Well, I have what's called the Final Order.

MR. SINGH: Yeah. Yeah, it's Paragraph 13, on Page 37, sort of talking about reverse marketing provisions.

THE COURT: Right.

MR. SINGH: And, as you said, Your Honor, it's a very long order, but it gets to -- a very long paragraph. It's going -- at about Page 40, right after the Definition of Reverse Marketing Provisions, Your Honor.

THE COURT: Yeah?

MR. SINGH: I think the relevant provision you were talking about before is that the DIP ABL agents, starts that first sentence: "will not apply proceeds of pre-

division unencumbered."

THE COURT: "received in connection with any exercise of Secured Creditor remedies, or from any sale, transfer or the disposition of such assets."

MR. SINGH: That's right, Your Honor, so the point of the provision being that the Senior DIP ABL agents agree to first lien basis as to the inventory, and then if they came up short, they would look to the other unencumbered collateral, but it wasn't that they didn't have a lien on the other unencumbered collateral.

THE COURT: Right. Okay, so it's basically -- I don't think Mr. Dublin was saying they don't have a lien, it's just a marshalling provision, right? So, I think he's -- you've summarized that correctly.

MR. SINGH: Yes.

THE COURT: I think he summarized that correctly. So -- it's amazing he remembered all of this.

(Laughter in the Courtroom)

THE COURT: All right. Okay. So, I have before me a Motion by the Debtors in these cases for approval of an Asset Purchase Agreement and modified, in related exhibits and documents, between them, and a newly-created entity that is going to be owned by the Debtors' current controlling shareholder, ESL, and other parties in the -- who will be in a minority position in that NewCo. The Second Circuit has

been addressing motions of the approval of the sale of all or substantially all of the business of a Debtor-in-Possession, which this sale, in essence, is, for decades, starting with in re Lionel Corp, 722 F.2d 1063 (2d Cir. 1983), in which the Second Circuit held that a Debtor-in-Possession can sell all or substantially all of its assets outside of a Chapter 11 plan, provided that the Judge finds a good business reason, based on the evidence before him or her. That's at Page 1071. And the sale is not -- outside of plan is not the result of undue pressure, separate and apart from there being a good business reason.

The sale here, at this point, is essentially unopposed, which the exception of an objection by the Debtors' Official Creditors' Committee. I have dealt with the other objections, which are primarily reservations of rights, with the exception of the Craftsman/Black and Decker objection, which I dealt with on the merits, but that involved the assignment of one particular asset, a trademark license. The Creditors' Committee does not oppose the sale of substantially all of the assets outside of a Chapter 11 plan. Indeed, the basis, or the primary basis for its objection, is that it would rather have all of the assets sold on a liquidation basis, outside of the -- outside of a Chapter 11 plan. So, the standard by which I should review the sale here is the essential standard laid out by Lionel,

which again, is, the Court needs to find a good business reason, based on the evidence before it.

As that standard has evolved over the years, it's important to note at the outset, the Second Circuit has made it clear that, these types of motions, even though they are of extreme importance in a bankruptcy case, are summary proceedings. That is, the Court, unless that proceeding is combined with an adversary proceeding, is not to determine interest in property or other issues that might affect the sale on a final basis, but rather, needs to determine the merits of the proposed sale itself. See, for example, in re Orion Pictures, 4F.3d 1095 (2d Cir. 1993), and in re Genco Shipping and Trading, Ltd., 509 B.R. 455 (Bankr. S.D.N.Y. 2014).

The general inquiry that the Court should make when considering the propriety of a sale motion under § 363(b) of the Bankruptcy Code is well laid out by Judge Lane in, in re Advanced Contracting Solutions, LLC., 582 B.R. 285, 310 (Bankr. S.D.N.Y. 2011), quote: "§ 363(b) of the Bankruptcy Code governs the proposed sale and use of Estate property outside of the ordinary course of business. The standard for approval under § 363(b) is whether the Debtor exercised sound business judgment." The case law concerning § 363 provides that the Court needs to review the business decision and whether it was made on a disinterested basis

with due care in good faith and according to some Court commentators, no abuse of discretion or waste of corporate assets. See also, in re GMC 407 B.R. 463, 493-94 (Bankr. S.D.N.Y. 2009), where the Court held to approve a § 363(b) sale: "A Court must be satisfied that notice has been given to all creditors and interested parties, the sale contemplates a fair and reasonable price, and the purchaser is proceeding in good faith."

A number of courts in this district, with the seminal case being in re Integrated Resources Inc., 147 B.R. 650, at 656 (S.D.N.Y 1992), and including the Advanced Contracting case that I quoted, go further and say that, in analyzing whether the proposed sale is a proper exercise of good or sound business judgment, the Court may apply the business judgment rule, which is essentially, as interpreted by those courts, a rule applying to transactions in the non-bankruptcy context that presumes that corporate decision makers and their decisions -- presumes, excuse me, that corporate decision makers and their decisions will be protected from judicial second guessing, and that courts are loath to interfere with corporate decisions, absent a showing of bad faith, self-interest or gross negligence, and will uphold the board's decisions as long as they are attributable to a rational business purpose, with the burden being on parties opposed to the exercise of such a decision,

and I appreciate the analysis that the courts in this district have done to apply that standard, but I have consistently held, and believe that Lionel and Orion, in the plain language of the statute, require more of an inquiry, at least where there are substantive objections to the proposed sale, which is the case here.

Ultimately, as laid out by the Second Circuit in the Orion Pictures case, albeit that that case involved the business decision to assume or reject contracts, but that decision was still out of the ordinary course, and I think the logic therefore applies to § 363(b). Ultimately, as laid out by the Second Circuit in the Orion Pictures is one where the Bankruptcy Court has to exercise its business judgment to determine, in light of all of the facts laid out on the record in the summary proceeding, whether, in fact, the decision does make business sense to sell the assets as proposed by the Debtor. And that's the standard that I have applied here.

The Second Circuit, in putting that burden on the Bankruptcy Court, also made it clear that the bankruptcy judge is looking into the future, and therefore cannot assure the benefits of the proposed transaction, but nevertheless, needs to evaluate it based on what it knows in the present day, to decide whether, in fact, the transaction makes good business sense. In doing so, the courts are

guided by not only the underlying consideration being provided for the assets, but also the process by which the assets were sold, and whether it was generally fair and within the constraints under which the selling party was operating, including the need for speed in some circumstances, and the like, designed to maximize the value. The case law is clear that § 363(b) sales do not require a formal auction process, as is confirmed by the SDNY guidelines on asset sales developed by the judges in the Bankruptcy Court in the Southern District, and that, with the right process, sales to insiders may be approved. However, an inquiry in the process is clearly warranted, especially where the sale is to an insider, as is the case here.

Again, though, the Second Circuit has given the Bankruptcy Courts guidance in dealing with sale processes, as stated by the Second Circuit in, in re Financial News Network, Inc., 980 F.2d 165 at 166, (2d Circ. 1992): “a Bankruptcy Court must perform a difficult balancing act when it conducts an auction of a Debtor’s assets. It walks a tight rope between, on the one hand, providing for an orderly bidding process, recognizing the danger that, absent such a fixed and fair process, Debtors may decline to participate in the auction, and on the other hand, retaining the liberty to respond to different circumstances so as to

obtain the greatest return for the bankrupt Estate." What one takes away from that opinion, and subsequent opinions is that, as reflected in the sale procedures order entered by the Court to govern the process for selling the Debtors' assets, regular procedures are important so that parties can rely on them, but overall supervision by the Court, with the input from key parties in interest, including the Debtors and the exercise of their fiduciary duties, the creditors' committee and other interested parties, is necessary to deal with issues that come up during the sale process, and that need to be addressed, if, in fact, addressing them will lead to increased value in a fair manner.

The last couple of points I will make, generally, on the Court's standard for reviewing this motion is that, typically, courts will consider whether the sale price was fair and the transaction in which it's being paid is one that makes good business sense, by looking to the sale price for all of the assets together, without discussion of the constituent parts, and as a subset of that proposition, the courts recognize that, provided that one keeps within the priority scheme of the Bankruptcy Code, there may be individual constituencies in a case who benefit more from a sale than others. For example, those who are parties to executory contracts or unexpired leases, whose contracts are being assumed by the buyer, will have their pre-petition

claims cured provide -- or there will be adequate assurance of a cure, whereas other unsecured creditors, after the payment of the sale proceeds to secured creditors, may get far less in respect of their unsecured claims. Nevertheless, such a sale, as long as the overall price is fair, and again, it doesn't violate other provisions of the Bankruptcy Code, will be approved. See, for example, in re TWA 2001 Bankr. Lexis 980, *32 (Bankr. D.Del., Apr. 2, 2001), and in re Ionosphere Clubs, Inc., 100 B.R. 675, 677 (Bankr. S.D.N.Y. 1989). See also, Mission Iowa Wind Co. v. Enron Corp., 291 B.R. 39, 43 (S.D.N.Y. 2003).

That case, that is the Enron/Mission Wind case, however, also stands for another proposition, which is that, as I said before, a sale cannot violate substantive rights, except as permitted by the Bankruptcy Code, for example, under § 363(f) of the Code, or violate the general priority scheme of the Bankruptcy Code. So, for example, in the Mission Wind case, the Debtor sought approval of a sale of assets that included not only its own assets, but assets of non-Debtor entities. Obviously, the proceeds of that sale needed to be allocated among the two sellers, which the District Court required to be done on a thorough basis. Allocation may also be important if assets are being sold by more than one Debtor to ensure that no particular Debtor is shortchanged for the assets that it is selling in respect of

the sale proceeds or consideration received from the sale, so that, to the extent that it has separate creditors, those creditors are not prejudiced. There has been a fair amount of talk during the trial in this similar proceeding as to whether or not the proposed sale would leave the Debtors, after the sale, administratively insolvent, that is, unable to pay their post-petition in 503(b)(9) pre-petition administrative expenses in full, as is required under a Chapter 11 plan for that plan to be confirmed, unless the administrative expense creditors waive that right.

There is no requirement under the Bankruptcy Code to ensure that a proposed sale of substantially all of the assets of an operating business result in administrative solvency. Indeed, there are a number of opinions cited in -- - indeed a number of opinions as cited in the Debtors' Memorandum of Law, to the contrary, but even more so, there are hundreds of cases that result in going concern sales with the subsequent dismissal of the case with unpaid administrative expenses. The Court's concern about administrative insolvency, nevertheless, is real, because the Debtor needs to be left with resources to ensure that the transaction's benefits will be received, and generally speaking, one wants to get as many claims paid as possible. But it is that context that I've reviewed the testimony regarding the effect of the proposed sale on the

administrative solvency of these Debtors. This sale motion has resulted in a far longer evidentiary hearing than most sale motions. I heard the testimony of 10 witnesses live, as well as reviewed deposition designations for one other witness, Mr. Kniffen, K-N-I-F-F-E-N, and deposition designations for Mr. Diaz, one of the Committee's experts. There are also several binders of agreed exhibits, which have been admitted into evidence.

But, it appears clear to me, having heard all of that testimony, and reviewed the evidence as deemed to be significant by the parties, that essentially, there are three underlying grounds for the Creditors' Committee objection to the proposed sale. The first is that the sale process under which the Debtors proceeded with the marketing of their assets that resulted in the sale that's sought to be approved today, was flawed to such an extent that the sale should not be approved, or if it were to be approved, I should not provide a finding under § 363(m) of the Bankruptcy Code, that the Purchaser engaged in the transaction in good faith, which is essentially the same thing as saying that I would not approve the sale, because no Purchaser would enter into an agreement without that finding.

The second argument that the Committee has made is that, in light of the only reasonable alternative here,

which is a prompt liquidation of the Debtors' assets, the proposed going concern sale is deficient, i.e., the hypothetical liquidation of the Debtors' assets would result in a higher or better transaction. Finally, the Committee has argued that there is insufficient value being provided by the Purchaser here, over and above its credit bid, in relation to the assets that it is purchasing that are not encumbered by a lien that would support the credit bid.

I'll address each of those objections in order, but before doing so, I will note that currently, there are no objections to the proposed sale, by any party, to an executory contract or lease that is sought to be assumed in today's order, other than cure objections, which the parties have agreed to resolve in the future. In other words, no party today whose contract is being assumed, or whose lease is being governed by this order, has objected today on the grounds of a lack of adequate assurance of future performance. The parties have been careful to reserve all rights in respect of that issue, in respect of any lease that is not specifically being assumed at the closing or executory contract, except where there has not been an objection and no expressed reservation of rights. As I noted, I entered an order approving a sale process here that contemplated taking bids for all or substantially all of the Debtors' assets, as well as bids for substantial portions of

the Debtors' assets, which could then be aggregated, if they were submitted in a qualifying way, to compete as a group to any bids that were made for all or substantially all of the assets.

I also made it clear that, any party seeking to make a proposal for real estate assets should do so, and the Debtors should take such proposals seriously. The record here is clear that, to thoroughly market the Debtors' real estate assets, one would need a minimum of four months. The Committee's expert has opined that it would be a disaster to market the real estate assets for anything less than over a year, and as much as 20 months. Obviously, the Debtors here could not, therefore, run a full real estate marketing process along with a going concern sale process that also would have contemplated bids for substantial portions of the Debtors' business to be aggregated, as I stated earlier. Nevertheless, as I said, those wishing to make material bids for real estate were encouraged, strongly, to put their best foot forward by me to do so - in the Bidding Procedure Order, it contemplated it. The Bidding Procedures Order contemplated that the Creditors' Committee, and other parties in interest, would have the right to come back to this Court to complain about how the process was being conducted in real time, and to seek a prompt pivot if the process was not being conducted in a way that would maximize

value, to a liquidation process that would start the active marketing of the Debtors' real estate assets in the manner that I previously described.

I have reviewed the testimony here on the process issues, including from the Debtors' side, the testimony by Brandon Aebersold, and the two independent directors, William Transier and Alan Carr. I've also considered the testimony of the Committee's investment banker, Saul Burien, and I conclude that, as far as a going concern sale process is concerned, the Debtors engaged in a thorough and fair process, given the constraints under which they were operating, mainly the need that all parties recognized, including the Creditors' Committee, that they could not sustain continuing operations for any meaningful length of time. The Committee, through Mr. Burien, has complained that certain potential buyers of segments of the Debtors' business were confused, or given short shrift, during the sale process, and that that is the reason that they were only indicative, or insufficient, rather, expressions or bids for parts of the Debtors that might be hived off on a standalone basis.

I have considered that allegation carefully, and concluded that, given the nature of this process, as supervised by me on a hands-on basis, that all parties in interest, including Mr. Burien, knew, if, indeed, these

problems were truly troublesome, they would have been raised to me so that I could have stepped in to have ensured either a little more time or a little more focus to maximize potential competing offers. None of that happened. It is also reasonably clear to me, based on the testimony not only by the bankers and directors that I've previously mentioned, but certain other witnesses, that the so-called potentially standalone businesses are closely integrated with the rest of Sears, and that there are meaningful issues related to separating them, that would potentially adversely affect a potential buyer's willingness to bid for such assets. That's, I believe, simply a fact that may well go to explain why the bidding for those assets was not more robust.

The Committee has also complained, as a process matter, that the insider purchaser tainted the sale process to its advantage. As a set of facts to support that conclusion, the Committee has pointed to three or four things. But before addressing them, I should note that the Debtors, then controlled by ESL, and before the commencement of these cases, and with ESL's consent, replaced ESL as the controlling party for purposes of a transaction of this kind, as well as a review of any claims against ESL, independently, and as how that may relate to a transaction of this kind, to third parties. The Restructuring Committee, and then a subset of that through a Restructuring

Subcommittee. Those independent third parties were represented by independent counsel and financial advisors. The two members of the Restructuring Subcommittee testified in the hearing before me on the sale motion, Mr. Transier and Mr. Carr.

I believe the record is crystal clear that the Restructuring Committee and Restructuring Subcommittee, a) actually had control of the Debtors with respect to the sale process and the Debtors' decision throughout that process as to whether to accept or reject any offers and how to conduct the process, b) that they were, in fact, truly independent, as evidenced by, among other things, their rejection of numerous proposals by ESL and heated and lengthy negotiations with ESL, c) that they were well and thoroughly advised by independent professionals, and d) that their focus was the proper one, which essentially, is the same standard that I have already outlined: does the proposed transaction represent the highest and best transaction available to these Debtors? I believe that they exercised their responsibilities in an active and informed way, and that they themselves were experienced in this area and brought their experience to bear, as opposed to being passive receptacles for their professionals' advice. There are numerous incidences in the record to reflect that. Under the circumstances, therefore, I believe that the

involvement of the proposed buyer here, as a bidder for the assets, was effectively neutralized, in respect of the Debtors' review of that bid, and the process that led to the bid, and the bid's acceptance.

The Committee, that is, the Creditors' Committee, has attacked that process, I believe, only by pointing to the fact that, after Mr. Transier first met Mr. Lampert, the controlling party of ESL, that meeting having been by phone, to lay out the -- in a board meeting that laid out the duties of the new board members of the Restructuring Subcommittee, and the fact that a joint office of the CEO would be formed, including Mr. Meghji and Mr. Riecker, and Mr. Transier, and therefore, Mr. Lampert, step down from making any decisions over the fate of Sears. Mr. Transier sent an email to Mr. Lampert in which he stated to Mr. Lampert that he admired how Mr. Lampert had handled those sensitive issues. Given the sensitivity of that transfer, I believe the email was appropriate. I don't believe it indicated that Mr. Transier took any less seriously his role as an Independent Director/Co-CEO and member of the Restructuring Subcommittee. Rather, it was simple diplomacy dealing with someone who potentially would regret and therefore cause problems later, the decision that he had made to turn over power over the fate of what had been his company to people he had never met before. There was no

suggestion of any subsequent communications between Mr. Transier and Mr. Lampert that would indicate Mr. Transier was anything other than an Independent Director who recognized that the company's interest, separate and apart from Mr. Lampert and ESL, needed to be protected, and that it was his job to do so.

The Committee also points to a letter sent by, among others. Mr. Riecker, R-I-C-K-E-R (sic), one of three of Sears Senior Managers, to the board, stating that they strongly hoped that the board would seriously consider a going concern exit for Sears, as opposed to a liquidation. There is evidence in the record that Mr. Riecker and the other authors of that letter were approached by Mr. Lampert before they sent the letter, and that they ran the letter by Mr. Lampert's counsel, but having assessed Mr. Riecker's credibility on the witness stand, it is clear to me that that letter, and the sentiment behind it, came from him personally, and that he would have said it whether Mr. Lampert told him to or not.

Finally, the Committee challenges the process, not based on how the parties, who were in charge of the process, conducted it or evaluated it, but, to the contrary, by the actions of ESL in the process. It points to two things. First, a letter sent on behalf of ESL to the Debtors' board during the course of negotiations leading up to the January

15th, sliding into the January 16th period auction. The letter was sent at a time when the Restructuring Committee and Restructuring Subcommittee had quite firmly indicated to ESL that it was not going to accept the current proposal by ESL that was then on the table, and was instead prepared to pivot to a liquidation.

The letter threatened the board with legal action for abuse of fiduciary -- breach of fiduciary duty, if it so took -- if it took such an action. The Debtors' counsel, the Restructuring Committee and Restructuring Subcommittee's counsel, the Committee's counsel and other parties, raised this issue immediately with the Court, which held a Chambers conference on the issue, at which those parties, as well as ESL's counsel participated. I made it clear in no uncertain terms that that letter was a mistake and should be ignored by all parties, including those who were handling the sale on behalf of the Debtor, including the independent board members. It is clear from the letter, and I made it clear at the Chambers conference, that the letter did not recognize that one of the major reasons, although not the only reason, that ESL's proposal had been rejected was that ESL was still insisting on a global release of all claims against it. In other words, the letter was half baked. I believe that it had literally no effect on the subsequent negotiations, other than, perhaps, giving the negotiators on

behalf of the company a little more negotiating leverage against ESL because obviously, I was unhappy that the letter had been sent, and had so characterized it. But clearly, it did not give ESL any more negotiating leverage, or affect the sale price. When I weigh that one mistake against the actions that ESL took to enable the sale process to be conducted in an independent way, it is clear to me that, all told, ESL conducted itself in this case, with respect to the sale process, in good faith, for purposes of § 363(m) of the Bankruptcy Code.

The Committee has also pointed to pre-petition actions by ESL that it contends means that it did not engage in good faith in the sale process that has led to the sale today. The evidence supporting that contention is, frankly, rather vague in the record, but I gather the argument is that, sometime in the past, ESL started to cause the sale of Sears, but resisted, until shortly before the bankruptcy petition date, actually setting up a structure to enable the sale in a meaningful way. Besides the evidentiary issue that I already addressed, my focus is primarily, if not exclusively, on the post-petition period, for purposes of § 363(m). Moreover, I don’t really understand the argument in the first place. To have a true sale process here of a store that relies on trade credit and the like, one needs to act fast, and generally in a bankruptcy environment, because

the sale would not have happened except in a bankruptcy environment. So, conducting the type of sale process that, apparently, the Committee thinks Mr. Lampert and ESL should have conducted, or Sears should have conducted some time before the petition date truly is not realistic. Certain of the groundwork could be laid, but the actual process needed to go through, for a business of this kind, a Court-supervised process under the Bankruptcy Code, because no buyer, really, would take these assets, at this point, I believe, without a Court order protecting it.

I believe that properties have -- I'm sorry, let me back up. I believe that the law is further clear that my focus should be on the post-petition period, not actions that the buyer may have taken pre-petition. See in re Wing Spread Corp, 92 B.R. 87, (Bankr. S.D.N.Y. 1988) at *93. But more importantly, I don't see the rationale behind the argument in the facts before me, which reflect, again, I think, a more important reality, which is that, there really were no other going concern buyers here, and the parties reasonably understood the liquidation alternative, and used the value that could have been derived in that alternative effectively in negotiating with ESL.

So, I conclude that the process here was proper and appropriate. If anyone wanted to, they could have complained. Mr. Lehane, counsel for a group of landlords

did complain at one point, the day of the auction, and I -- as I said during the trial, I responded to him, I believe, within five minutes as well as to the Debtors' counsel, to make it clear that the landlords could attend and continue to make indicative proposals, if they wanted to, but, notwithstanding the various protestations of an improper sale process, I did not receive other complaints until after the fact.

The second basis for the objection is that the proposed transaction is inferior to a liquidation sale of the Debtors. To be clear, this appears to me to be primarily a dispute over the value of the Debtors' real estate assets, and secondly, the likelihood that ESL will perform the non-cash payment aspects of its proposed purchase agreement. It is true that the Debtors have -- would have in a liquidation scenario, the ability to sell certain business segments, although I believe the parties agree, and frankly, if they didn't, I believe it to be the case, that the value of those business segments is substantially tied to an ongoing Sears, and would be greatly reduced if Sears were liquidating. I believe there is little disagreement about the value of those segments, or frankly, about the other assets besides real estate, that is in any way meaningful.

The parties do disagree over the realizable value

of the Debtors' real estate. I carefully considered the testimony offered on that subject by Michael Welsh, the Debtors' expert from Jones Lang LaSalle, and to some extent, Mr. Meghji, the Debtors' CRO, and from the company side -- I'm sorry, from the Committee's side, Mr. Greenspan of FTI Consulting. I found that the assumed value of the Debtors' real estate to the Debtor, as opposed to those that might have a lien on that real estate, i.e., those who would be entitled to the proceeds before the Debtor received them, to be credibly set forth by Mr. Welsh, and supported by Mr. Meghji.

Mr. Welsh's valuation assumed the reality here, which is that the pivot to a real estate sale would be extremely difficult, given the number of Debtors' properties and the big box size of so many of them, as well as the fact that, with respect to the Debtors' leased assets, which comprised most of the real estate assets, the Debtors' ability to keep landlords at bay under § 365, would end at the beginning of May of this year, at which point, any landlord, who believes that there, in fact, is value in the lease, would have a strong incentive not to consent to a further extension of the time to assume or reject.

Any buyer would know that too, and therefore would prefer to deal with the landlord directly as opposed to the Debtor. So, the Debtors' window for a real estate sale

process was constrained, as Mr. Welsh properly opined. The committee has criticized the Debtors' evaluation of the real estate, other than focusing on the timing point, by noting that, where there were indicative bids for the real estate, even if those bids were substantially smaller than the professional estimates by Jones Lang LaSalle, the Debtors included them as a data point equally with the other appraisal information.

There is something to be said for the Committee's point, particularly if an indicative bid was a clear outlier, as was the case with many of the bids for certain leases or other real estate assets. On the other hand, given the, I believe, relatively small number of large potential bidders here, the response by potential bidders for the real estate to the Court's invitation to put their best foot forward and at least an indicative bid, was certainly underwhelming. I believe it's consistent, at a minimum, with Mr. Welsh's view that, given the number and size of the Debtors' real estate assets, parties wanted to keep their options open to see how the case shook out. that works both ways. They didn't put their best bid forward, but they also weren't reserving their right to make a much lower bid in the future, if the Debtors' negotiating leverage, as was inevitable with the ticking of the clock, under § 365, would decrease.

In any event, Mr. Meghji testified that the delta, if one included as the Debtors did, those indicative bids in the valuation, and if the Debtors didn't include it, was roughly $70 million dollars, which no one on the Committee side has contradicted. Mr. Greenspan, in dealing with another $70 million-dollar error, which he recognized, did not actually reflect it in one of his valuations, because he said it was just a mere rounding error.

Turning to Mr. Greenspan, I don't think I have ever seen an appraisal of a real estate portfolio that was more divorced from reality than his determination that we should value these assets based on an 18- to 22-month marketing period. That is simply not what the Debtors had available to them. When you take that out of his calculation, and when you recognize, as one must, that the period really would be approximately four months, the valuations are substantially the same.

The other minor number of assets that FTI evaluated, that the Debtors didn't evaluate, could be potentially available to the Debtors, was limited to about 20 percent, according to Mr. Greenspan's testimony, of the assets that the Debtor didn't evaluate at all. Of that 20 percent, he appears to have not recognized that, in a number of cases, there were prior lienholders that would have a right to all of the proceeds, and would have in fact -- that

they would, in fact, not be paid in full from the proceeds before the Debtors' Estate would, and at least in one case, that, by his own analysis, comprised approximately 10 percent of that extra value, he clearly just got wrong whether the Debtor was paying any current rent under the lease.

His explanation for that omission, frankly, didn't make sense to me. He said that the market rent number of $8.50 must actually reflect the arbitrage number, ignoring the fact that the very next column was headed Arbitrage, and also had the $8.50 number. So, clearly, arbitrage was the whole market rent that he stated.

Obviously, that was just 1/10th of the unencumbered asset valuation that the Debtors didn't undertake, but it certainly cast more doubt on his testimony, which frankly, I completely discounted anyway, given his view on the ability of the Debtors to conduct their real estate sales that he posits, within the timeframe that he posits. It's simply not a viable basis for a comparison to the deal presently before the Court.

That leaves the Committee's argument that the value in the ESL transaction, which I find -- if I find -- found it to be, on its face, $5.2 billion, clearly exceeds the value to the Estate of a liquidation approached, based on the foregoing analysis. The Committee, as I said,

contends that that value isn't really there, that it's illusory. I conclude to the contrary, that there is a reasonable basis to believe that, in fact, the value will be received by the Debtors. There are several different issues that this raises, or this analysis raises. First, the Debtors contend that the limited release that ESL will receive as part of this transaction, leaves the Debtors with substantial, valuable litigation claims against ESL, that the release is carefully confined to equitable subordination and recharacterization claims for which ESL is paying not only $35 million dollars, but also, the entire deal, which is premised on a portion of the deal, $1.3 million being the credit bid, and a settlement of ESL's recovery in respect of its allowable claims from other assets of the Estate.

It appears to me, based on oral argument, at least, that the Committee, when pushed, does actually recognize that the release is, in fact, limited, and that the remaining causes of action are appropriately preserved.

The Committee contends, and this is a tautology, that in granting the release that would be granted to ESL, the Estate is giving up a potential remedy, which is assets to -- is to limit the recovery that ESL would get in the bankruptcy case through equitable subordination or recharacterization, and that concomitant with that, the proceeds that would otherwise go to ESL from the liquidation

would go to other creditors. I have two responses to that argument. The first is that it appears to me that there are substantial sources of recovery at ESL and assets that it owns, including Seritage, that remain available to the Estate on its litigation claims.

Secondly, I want to reiterate that the underlying causes of action that are preserved have, essentially, the same quantum of proof as equitable subordination claims have. Unfortunately for her, Judge Chapman has had to deal with these issues, more than her fair share in the recent past, including in, in re LightSquared, Inc. 511 B.R. 253 (Bankr. S.D.N.Y. 2014) and in re Sabine Oil and Gas Corp., 457 B.R. 503 (Bankr. S.D.N.Y. 2016).

In those cases, she goes through the elements of equitable subordination, and I think, accurately summarizes them, in addition to noting that it is a remedial equitable power, and that the revenue is limited to a subordinating a claim to the extent of any actual damages, the damages would need to be shown for equitable claims outside of bankruptcy as well, although, with regard to fraudulent transfer, the transfer is what would be avoided.

She states that: “Courts of this District have held that there is no different or heightened standard by which to judge a non-insider’s conduct for the purposes of equitable subordination, though there may be fewer

traditional grounds available because neither under capitalization nor breach of fiduciary duty applies to the conduct of a non-insider." That's at Page 348.

Here, the Debtors are preserving breach of fiduciary duty claims and other equitable claims. It's a complete overlap. So, in other words, Sears gets to reorganize, but these claims are preserved, nevertheless. To me, that is a completely fair and reasonable settlement, considering all of the issues, including collection issues.

Secondly, the Committee contends that certain of the obligations that ESL is undertaking to pay don't have to be paid immediately upon closing, but will be paid over time, albeit over a relatively short period of approximately three to four months, at most. In that context, it challenges the ESL business plan that was introduced into evidence and supported by the testimony of not only ESL's witness, Mr. Kamlani, but also Mr. Meghji, Mr. Riecker, and to some extent, Mr. Transier and Mr. Carr, although to a much more limited extent. That business plan in itself is premised upon a standalone business plan that Sears developed shortly after the start of these bankruptcy cases, for a somewhat larger footprint of stores, 505 instead of 425. The Committee points out that, in the past, Sears has dramatically underperformed as against projections. The Debtors have pointed out that in the more recent past,

literally meaning months before the bankruptcy filing, which acknowledges a brief period, the Debtors have actually -- or did actually perform well and consistent with their projection, and consistent with the projections in the Sears and ESL business plans, or at least reasonably consistent with those projections, given that, under the ESL business plan, one is talking about 80 fewer stores and a far lower debt load, and dealing with stores that truly have value.

I have carefully reviewed Mr. Kniffen's deposition excerpts that were introduced to go along with his declaration, which I've also carefully reviewed. I do not view his conceitedly expert testimony with any greater degree of deference than the testimony I received from Mr. Kamlani, Mr. Riecker, or the other Debtor witnesses. Clearly, the latter group are far closer to the actual facts of Sears. Mr. Kniffen has not actually worked in retail since 2005. He's been a consultant to people who are interested in retail since then, but has not actually had the pleasure of dealing with the admittedly, and he admits this, changed environment over the last decade for big box retailers.

For the period that really is at issue here, which is the next several months, I believe, based on the evidence before me, that ESL or the buyer, will, in effect, will in fact, rather, perform its obligations under the agreement.

If it breaches the agreement, it will be the subject of every lawsuit, including equitable subordination, and it will have lost a substantial new investment that it will be making in this business. Accordingly, I conclude that the execution risk for this transaction, when one considers the alternative, which has its own execution risk, is reasonable to take. One aspect of the transaction creates additional execution risk, which we spent some time on in oral argument. It is the proper interpretation of § 2.3(k) of the Asset Purchase Agreement.

As set forth in the Orion Pictures case that I previously cited, given the procedural context of this matter, I cannot conclude that issue, those two different interpretations, dispositively. See also, in re Sabine Oil and Gas Corp., 550 B.R. 59, (Bankr. S.D.N.Y. 2016). I do, however, have an obligation to review the issue, make sure I understand it, and determine how I believe it would turn out with a proper record, in the proper procedural conduct -- context, just as Judge Chapman did in the Sabine case that I just cited, when she interpreted a similar contract issue. Based on my review of § 2.3, including subsection (k), subsection little roman (v) of that subsection (k), and the schedule that is incorporated into the definition of the defined term, “Other Payables,” which appears in the definitional section of the agreement, as well as my

evaluation of the analysis given to me by ESL's counsel that includes a review of the defined term, "Other Inventory" that appears in the APA and Schedule 1.1(f), that deal with other inventory, I believe it's reasonable to assume that the Debtors' interpretation of § 2.3 would prevail in a proper litigation. Namely, that the parties defined separately the concept of Other Payables from all payment obligations with respect to ordered inventory, which is the clause that precedes the words, "Other Payables" in § 2.3(k) and further, that the parties clearly set forth in little roman (v) of subsection (k) that the cap of $166 million would apply only to other payables, not to the phrase that follows, those two words in subsection (k), namely, quote, "and all payment obligations with respect to ordered inventory." I'm more than reasonably confident that that would be the result in a contested matter brought before the Court under the Part 7 rules.

That leaves, of course, the Debtors with their obligation to as, and I'm summarizing the agreement, the agreement will control, obviously, conduct their operations in the ordinary course, pre-closing, and any other rights under the agreement, that either party has. But the Debtors have stated to me, they're willing to live with that -- those terms of the agreement.

There are certain other conditions to the

agreement, closing conditions that need to be satisfied. I am reasonably confident, based on Mr. Meghji's testimony, and Mr. Riecker's testimony in particular, that they will be, and further, that the parties will deal with each other in good faith to enable those conditions to happen, particularly given the identification of ESL with this business and the consequences that would happen to it. That is, the Sears business with which it's identified, if they do not deal with it -- each other in good faith to resolve those conditions to closing.

And the last point I will make, although I believe only the asset side really needs to be addressed, and I've already done so, when comparison -- when comparing the ESL transaction to the liquidation alternative, but I will, nevertheless, mention that, in each of the committee's calculations, it has made assumptions regarding the treatment of ESL's claims in these cases that I believe are not warranted, and that would, at a minimum, lead to substantial litigation and litigation risk for the Estates. Namely, the Committee has assumed that, notwithstanding a pivot to a liquidation sale at its request, the Estate would be able to prevail on making substantial charges to the underlying collateral that secures the ESL secured debt, and the DIP loans.

The ability to surcharge collateral under § 506(c)

of the Bankruptcy Code is constrained by the language of the statute itself, and the case law, including the leading case of in re Flagstaff Food Service Corporation, 739 F.2d 73 (1984). See also in re Domistyle, Inc., 811 F.3d 691 (5th Cir. 2015), cert denied,2017 US Lexis 3509, May 30, 2017.

Those cases make it clear that the determination of surcharging collateral is a difficult one for the Court. It requires the Court to make judgments as to whether the expenses incurred by a Debtor were for the primary and direct benefit of the secured creditor, as opposed to other parties in interest in the case.

This issue is usually dealt with by stipulations between the parties, because they know how difficult it is to litigate. Properly here, the Committee insisted on certain carveouts from 506(c) waivers, but that didn't eliminate the difficulty of litigating such an issue. The word "primary" does not appear in the statute, but the courts have applied it, because otherwise, as the Domistyle court notes, the statute could, in essence, eat up the narrow -- the interpretation could eat up the narrow nature of the statute, which is a direct benefit.

Secondly, the Committee has completely discounted any right that ESL would have under § 507(b) to a super-priority administrative expense, based on the decline of its collateral value since the start of the bankruptcy cases.

Until disallowed, ESL's secured claim is entitled to adequate protection, including under 361(3), a super-priority claim under § 503(b) and § 507(b). Determining the decline in value of the collateral during the course of the bankruptcy case, it's again, an extremely difficult issue. It was dealt with by Judge Glenn in, in re Residential Capital, LLC., 501 B.R. 549, (Bankr. S.D.N.Y. 2013). It's fact-based, dependent upon the value of the collateral at Time 1 and Time 2. To give absolutely no consideration to that claim, I believe, in terms of comparing creditor recoveries under a liquidation process to the ESL going concern transaction, I believe, is quite inappropriate.

So, for all those reasons, I will grant the motion. I believe the proposed order needs some work, along the lines of the marks that were stated on the record in oral argument today, but that that work is relatively modest and, it would appear to me, that I should be in a position to enter it tomorrow morning, if it's provided to me in a black line form. It will include, for the reasons that I stated on the record, a finding that the transaction and the parties to it are entitled to the protection of §363(m) of the Bankruptcy Code.

I would like to say one other thing, which is simply to echo remarks that Mr. Seltzer made, not only on behalf of prospective union employees, but all employees of

this company. During the course of this case, Mr. Lampert in particular, and ESL generally, has been subject to substantial verbal abuse.

(Laughter in the Courtroom)

THE COURT: He is a wealthy individual and a big boy, and I guess he can take it. Some of it based on past years, maybe justified, or may not be justified. That will be part of the record in the litigation that's fully preserved, here. I can say that, that abuse has led to, as Mr. Bromley kind of probably, more like what I am about to say, summarized two conflicting views of him, that he's somehow Jay Gould and Barney Fife at one -- one and the same time. He has the opportunity now not to be a cartoon character, and to take actions that, I believe, Mr. Kamlani mentioned, would in fact, be of great meaning to the Debtors' constituents. He should do that. A clear communication process, both with vendors, but importantly, with employees, is really warranted. Okay, thank you.

(Whereupon these proceedings were concluded at 3:53 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
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Date: February 9, 2019